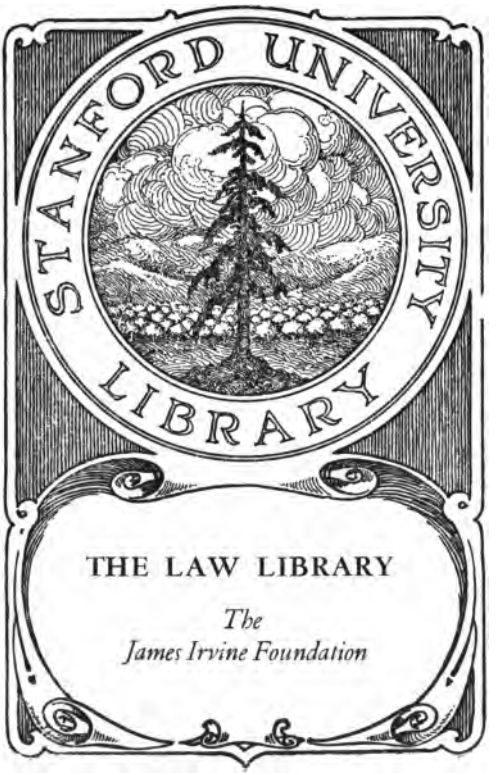
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A

SUMMARY

OF THE

POWERS AND DUTIES

OF

JURIES IN CRIMINAL TRIALS

IN SCOTLAND.

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PREFACE.

In attempting to frame a Manual for the use of Jurymen in Criminal Trials, it has been the wish of the Author to explain the principles and practice of the law in a full and comprehensive manner, and, at the same time, to compress the work within such narrow limits as might render it easily accessible to the unprofessional readers for whom it is intended. He trusts that his anxiety to reconcile these objects has neither produced any degree of obscurity, nor led to the exclusion of any matter of real utility.

As the value of a work of this kind must depend, in a great measure, on its authority, care has been taken, in every instance, to refer to the sources from which the materials of the compilation have been derived. The accuracy with which the work has been executed may thus, without difficulty, be judged of. Reference has been made occasionally to unreported cases, which have been tried in the Courts, chiefly during the last nine years, and many of which embrace points of considerable importance. These cases, it may be added, occurred, for the most part, under the Author's immediate observation, and in some of them he acted as counsel for the pannel.

Edinburgh, *May*, 1833.

POWERS AND DUTIES

OF

JURIES IN CRIMINAL TRIALS.

INTRODUCTION.

THE object of this Treatise is to furnish a practical Commentary on the Law of Scotland, in relation to the nature and discharge of the functions of Jurymen in Criminal Trials.

The work is divided into Four Parts, and each Part comprehends several subordinate divisions.

The FIRST PART relates to the constitution of the JURY, and the nature of their office,—comprising the qualifications of the jurors,—the framing of the jury lists,—the balloting and setting of the assize,—and the rules relative to the seclusion of the jury while engaged in the discharge of their duty.

The SECOND PART relates to the nature and principles of EVIDENCE, as laid before the jury, in order to form the ground of their judgment,—and comprehends the *substance* of evidence, or the materials of which it consists, on the part both of the prosecution and the defence,—and the *sufficiency* of evidence, or its capability to establish the point at issue, as depending on the credibility of the witnesses, and the import of their testimony.

The THIRD PART comprehends the nature and qualities of CRIMES, as constituting the subject-matter to which evidence has to be applied.—In this division of the work, copious details are given of the different species of crimes which usually come before juries, and of the peculiarities in the application of evidence in proving them. This naturally leads to a consideration of the circumstances by which crimes are characterised as *individual acts*, and which require to be set forth in the libel,—and an inquiry follows as to the proof of these circumstances, as distinguished from the proof of the general qualities of crimes.

The FOURTH PART relates to the VERDICT, or Judgment of the Jury, and comprises the different species of verdict,—the requisites of a good and sufficient verdict in different situations,—and the effect of the verdict in finally disposing of the case submitted to the jury.

PART I.

OF THE CONSTITUTION OF THE JURY, AND THE NATURE OF THEIR OFFICE.

1.—QUALIFICATION OF JURORS.

PERSONS called to serve on juries in Scotland must be possessed, at the time, of lands or tenements of the yearly value of £5, or of personal property to the extent of £200. The lands or tenements must be situated within the county or town from which the jury is to come; but it is immaterial whether they are held by the person in property or in life-rent, or whether in his own right or in right of his wife.[1] It is also necessary that the person called to serve be within the ages of twenty-one and sixty.[2] The following persons are exempted from the duty of serving on juries:—Peers; Judges of the Supreme Courts, including the Commissaries of Edinburgh; Sheriffs and Stewarts; Magistrates of Royal Burghs; Ministers of the Established Church; other Ministers of religion, who have taken the oaths prescribed by law, and whose place of meeting is registered; Parochial Schoolmasters; practising Members of the Faculty of Advocates; practising Writers to the Signet, and Solicitors of the Supreme and Inferior Courts, who have severally taken out their annual certificates; officiating Clerks, and other Officers in Courts of Justice; Professors in the Universities; practising Physicians and Surgeons; Officers of the Navy and Army, in full pay; Officers of the Customs and Excise; Jailors, and Keepers of Houses of Correction; Messengers-at-Arms, and other Officers of the Law.[3]

2.—LIST OF JURORS, AND MANNER OF FRAMING IT.

The names and designations of the jurymen summoned upon any trial must be specified in a list served upon the pannel. The number of jurors is limited to forty-five, but an addition may be made to the list, where it is deemed ne-

[1] 6th Geo. IV. c. 22, § 1. [2] Ibid.
[3] Id. § 2.—Fleshers, or butchers, were for many years excluded from serving on juries, from a prejudice, as it would seem, respecting their trade. On a petition, however, from the Incorporation of Fleshers in Edinburgh, (1826,) the Court found them entitled to serve like the rest of the lieges.—Shaw, 156.

cessary, by authority of any one of the Lords of Justiciary ;[1] this power has of late been frequently exercised for the Circuits. By a recent Act of Adjournal, (22d June, 1831,) the number of jurors is extended to sixty-five, for the High Court, where more than three cases are set down for trial on the same day, or where more than three persons are included in one indictment. The duty of making up the list of jurymen belongs to the Sheriff of Edinburgh, when the trial takes place in the High Court, and to the Sheriffs of the several counties, when it takes place on the Circuits. This matter is regulated in such a way as to secure the return, in regular succession, of all persons liable to serve within the respective districts. The manner in which the list is made up is as follows :—Each Sheriff is bound, by special statute, to keep a book, entitled, "The General Jury Book," in which are set down the names of all persons within the county who are liable to serve on juries ; and from this book he makes up the list for any trial, by taking the names from the book exactly in the order in which they stand, his immediate authority for doing so being a notice or requisition from the Clerk of the Court in which the trial is to take place.[2] It is necessary that one-third of this list, as nearly as possible, should consist of what are called *special* jurors, that is, persons possessed of heritable property yielding £100 of yearly rent, or personal property to the amount of £1000.[3] Where the list taken from the general jury book does not contain this proportion of special jurors, the deficiency is supplied by taking as many names as are required from a book, called "The Special Jury Book," which book the Sheriff is bound to keep along with the general jury book, and which is prepared by copying, from the latter, the names of those who are qualified to serve as special jurors.[4] In taking the names from these books, the Sheriff must proceed in regular order, from the beginning to the end of the books ; observing always to commence with the name immediately after the last in the preceding return, without regard to the Court to which such return was made.[5] Where the return is made for trial in the High Court, and the list con-

[1] 6th Geo. IV. c. 22, § 17 and 15. [2] Id. § 3, 7, 8, and 9.
[3] 7th Geo. IV. c. 8. [4] 6th Geo. IV. c. 22, § 7 and 4.
[5] Id. § 10.—Returns are made from the same books for trials in the Inferior Courts ; and also for trials in civil causes in the Court of Session, and in the Court of Exchequer.—The general and special jury books are kept in the Sheriff Clerk's Office of each county, and are open to the inspection of any person desiring it, on payment of a fee of one shilling. (6th Geo. IV. c. 22, § 3, 4.) The Sheriff is bound to have new jury books prepared before the former ones have been completely exhausted ; so that there may be always a sufficiency of names for making the returns, (§

sists of forty-five persons, twenty-four of these must be from the City of Edinburgh;[1] six from the Town of Leith; six from the remainder of the County of Edinburgh; four from the County of Linlithgow; and five from the County of Haddington; and where more than forty-five is required, the same proportions, as nearly as possible, are preserved.[2] On this account, the jury books of Linlithgow and Haddington are transmitted, as soon as made up, to the Sheriff of Edinburgh,—the Sheriffs of the former counties not being required themselves to return lists for trial; and the jury books of the County of Edinburgh are divided into three parts, corresponding to the City—the Town of Leith—and the remainder of the County.[3] When jurors are required for the circuits, the Sheriff of each county embraced in the circuit returns to the Clerk of Court a certain number of names taken from the jury books of the county; and which, of course, varies according to the total number of persons required. The following are the proportions returned from each county where the total number required is forty-five:——SOUTH CIRCUIT.—Court sitting at *Jedburgh*. Berwick, ten; Peebles, seven; Selkirk, eight; Roxburgh, twenty.—Court sitting at *Dumfries*. Dumfries, thirty; Kirkcudbright, fifteen.—Court sitting at *Ayr*. Ayr, thirty-five; Wigton, ten.——WEST CIRCUIT.—Court sitting at *Glasgow*. City of Glasgow, (including Anderston, Gorbals, and Calton,) twenty-one; remainder of the County of Lanark, nine;[4] Renfrew, ten; Dumbarton, five.—Court sitting at *Inverary*. Argyle, thirty-five; Bute, ten.—Court sitting at *Stirling*. Stirling, twenty-five; Clackmannan, ten; Kinross, ten.——NORTH CIRCUIT.—Court sitting at *Perth*. Perth, fifteen; Fife, fifteen; Forfar, fifteen.—Court sitting at *Aberdeen*. Aberdeen, twenty-five; Kincardine, ten; Banff, ten.—Court sitting at *Inverness*. Inverness, eighteen; Elgin, six;

11;) and the number of names in the special jury book must not at any time exceed one-third of the number of *common* jurors in the general jury book; (7th Geo. IV. c. 8, § 3.) The Sheriff is also directed to mark in the jury books, the *date* when any juror has been returned to serve, (6th Geo. IV. c. 22, § 10,) and to distinguish in his return (which must be subscribed by him) the special from the common jurors, (§ 7.) It is also provided, that if the Sheriff wilfully depart from any of the provisions of the statute, he shall be liable in a penalty of £50, which may be recovered by summary complaint to the Court, (§ 14.)

[1] Including its environs, within the bounds of police, as defined by 3d Geo. IV. c. 78.

[2] 6th Geo. IV. c. 22, § 7.

[3] Id. § 6 and 5.

[4] The jury books of Lanarkshire are divided into two parts, similar to those of Edinburgh; one part containing the names of jurymen residing in Glasgow, Anderston, Gorbals, and Calton, and the other, the names of those residing in the remainder of Lanarkshire.—6th Geo. IV. c. 22, § 5.

Nairn, six; Ross and Cromarty, nine; Sutherland, three; Caithness, three. Where the number of jurors required on any circuit is more than forty-five, the same proportions, as nearly as may be, are preserved, one-third of the whole list being, of course, special jurors.[1] Where the person to be tried is a *landed man*, a majority of the jury must consist of persons of the same rank.[2] In such case, therefore, the Sheriff makes a return of landed men, in the order in which they are set down in the jury-books: so that a majority of the list may consist of landed men.[3]

3.—CITATION OF JURORS.

The warrant to summon the assize, where the process is by criminal letters, is in the will of the letters themselves; where it is by indictment, it is in letters of diligence under the signet of the Court; in either case, the list of assize is separate from the warrant,[4] and must bear the signature of one of the judges.[5] The citation of a juror is equally good, whether given personally, or at his dwelling-place;[6] and it is not necessary that the officer giving the citation be at the time possessed of the warrant by which he acts.[7] The time of notice, or *induciæ*, which a juror is entitled to have, does not seem to be precisely fixed; but it may be stated generally, that it ought to be of a reasonable length.[8] If a juror absents himself from the trial, after being duly cited, he is liable in a fine (or *unlaw*, as it is called) of 100 merks.[9] The Court, however, has the power of excusing a juror from attendance, provided the grounds of the excuse are stated in open Court.[10] Where a juror is unable to attend from indisposition, a certificate by a medical person, upon soul and conscience, ought to be produced.

4.—BALLOT, AND CHALLENGE, OF JURORS.

What has been hitherto said relates to the great assize, or list of forty-five persons. The select or lesser assize, who serve

[1] 6th Geo. IV. c. 22, § 8. [2] 2 Hume, 311, 3d Edit.
[3] 6th Geo. IV. c. 22, § 12.—The privilege of being tried by a jury of this kind belongs only to a proprietor infeft, and not to his eldest son or heir-apparent. It does not belong to portioners or petty feuars, and still less to such as are infeft for security only, or in some inferior interest in land. If the pannel waves his privilege, the proceedings are good, though there should be no landed men on the jury.—2 Hume, 312.
[4] 2 Hume, 307. [5] 6th Geo. IV. c. 22, § 15.—See below, "Libel."
[6] 2 Hume, 307. [7] 9th Geo. IV. c. 29, § 7. [8] 2 Hume, 307.
[9] Ibid.—Amounting to £5. 11s. 1⅓d. sterling.
[10] 6th Geo. IV. c. 22, § 19.

on the trial, are in number fifteen; though, in former times, the number seems to have occasionally varied from nine to seventeen.[1] This assize is chosen by ballot from the great assize in the following manner: The name of each juror is written on a separate piece of paper, each piece being of the same size, and rolled up, as nearly as possible, in the same form; and they are put into two glasses,—the names of the special jurors into one glass, and the names of the common jurors into another. The Clerk of Court then draws the names, one by one, from the glasses, in the proportion of one from the glass of special jurors, and two from the other, till the number fifteen is made up; and the persons so drawn constitute the jury for serving on the particular trial. If any of the persons drawn do not appear, or are challenged and set aside, their places are supplied by others drawn in the same manner from the proper glasses.[2] Where the pannel is a landed man, and a return has been made accordingly, a majority of the jury is drawn in the same manner from the list of landed men, and the remainder from the list of *common* jurors.[3] The prosecutor and *each* pannel is separately entitled to challenge five of the jurors, without assigning any reason for doing so; and such jurors are not allowed to serve on the trial. But not more than two of these five challenges must apply to special jurors. The challenge must be made when the name is drawn, and is not afterwards permitted.[4] Besides this peremptory challenge, both the pannel and the prosecutor are entitled to object to any juror, *on cause shewn*.[5] Thus, it is a sufficient objection to an assizer, that he is an infamous person; one who is so *infamia juris*, or that he is an outlaw, who has no character in law even to defend himself, much less to determine on the guilt of another. Such, probably, it also is, if the juryman is at enmity with the pannel,—if either of them have suffered evil deed or grievous injury from the other; or if the juryman have even given way to strong expressions of hatred or revenge: for the same rule is not applicable here, as in the case of witnesses, for whom no substitutes can be found.[6] It is also a good objection to a juror, that he is insane, or deaf, or dumb. Thus in the case of Simpson and Brown, (1786,) a juryman was allowed to withdraw, who objected for himself, that he was disqualified, in some measure, by deafness.[7] In the case of a prosecution at a private instance, it is a good objection to a juryman,

[1] 2 Hume, 308. [2] 6th Geo. IV. c. 22, § 17. [3] Ibid.
[4] Id. § 16. [5] Ibid. [6] 2 Hume, 310. [7] Id. 318.

that he is near of kin to the prosecutor. Formerly, assizers were not admissible, if placed in circumstances which might tend to bias them in favour of the prosecutor; but such pleas have not in recent times been attended to. In the case of Gerald, (1794,) tried for sedition, an objection was made to William Rankine, his Majesty's tailor, as a person under the influence of the Crown, but the objection was repelled.[1] In like manner, in the case of Macdougal, (1814,) for uttering forged notes of the Bank of Scotland, several of the jurymen, who were stockholders of the Bank, were allowed to be withdrawn of consent of both parties. But the Court declared that there was no objection, in point of law, to the service of stockholders in such cases.[2] When a juryman is objected to as wanting any of the statutory qualifications,[3] as, for instance, being under age, such objection can only be proved by the oath of the juryman himself.[4] It is not competent to object to a juryman on the ground of any irregularity in making up the lists, or in citing him to attend,—even though there should have been no citation at all,—provided his name is in the list of jurors served upon the pannel.[5] The Court, however, have, in all cases, power to judge of any felonious act by which jurors may be returned to serve, contrary to the provisions of the statute.[6] Where the name of a juror is not in the list served upon the pannel, he may be competently objected to, because the pannel, in such a case, has not received the previous notice in regard to that juror which the law requires. The same would seem to be true where there is any material error in the name or designation of the juror, as appearing in the pannel's list; although, perhaps, as in the case of a witness, the objection would only be sustained where it appeared that the pannel had been actually misled in his inquiries as to the juror.[7] The omission or erroneous insertion of a juror's name in the *principal* list, does not seem to be a sufficient ground of objection, as that is a matter which only affects the regularity of the citation; and jurors are admissible though erroneously cited, and even though not cited at all.[8] All objections, *of whatever kind*, must be stated before the juror has been sworn to serve, as

[1] 2 Hume, 311. [2] Id. 318. [3] See before, p. 3.
[4] 6th Geo. IV. c. 22, § 16.
[5] 6th Geo. IV. c. 22, § 14.—9th Geo. IV. c. 29, § 10.—This list must be served upon the pannel along with a copy of the libel, and a list of the witnesses, fifteen days before the trial.—2 Hume, 309.
[6] 6th Geo. IV. c. 22, § 14. [7] 9th Geo. IV. c. 29, § 11.
[8] 6th Geo IV. c. 22, § 14.—9th Geo. IV. c. 29, § 10.

the statute expressly declares that none shall afterwards be competent.[1]

5.—SEPARATION, AND SECLUSION, OF THE JURY.

After being balloted and received as competent to the office, the jurors are carefully separated from the other persons on the list, and are set apart in a place by themselves. The following oath is then administered by the Clerk of Court to the whole fifteen assizers collectively:—"You swear by Almighty God, and as you shall answer to God at the great day of judgment, that you will truth say, and no truth conceal, in so far as you are to pass upon this assize." When once sworn, none of the jurors can be removed without the pannel's consent, even before going to proof, unless for necessary reasons emerging at the time, such as insanity, severe illness, or the like; but if the pannel agree, (and before proceeding to proof,) it would seem that a new assizer may still be substituted for any reasonable cause. This was done in a case already mentioned, (Simpson and Brown, 1786,) where a juryman objected for himself that he was disqualified from deafness.[2]

When the jury are sworn, they become exclusively vested with the disposal of the case, as regards the prisoner's guilt or innocence, and with their judgment, whatever it may be, the Court cannot interfere. This result ensues from the previous deliverance of the Court, called the interlocutor of relevancy,[3] which finds, that the libel is correctly framed, and remits the case to the consideration of an assize. With the view of securing a just and impartial judgment on the part of the jury, certain rules are laid down, both at common law and by statute, which must be carefully observed, in order to render the proceedings valid. The points of importance for this purpose are, that the jury should be put in possession of the whole evidence upon which the case is rested; and that they should not be exposed to private solicitation or influence of any kind, but be left to judge of the matters re-

[1] 6th Geo. IV. c. 22, § 16.—When a juror is subject to sudden fits of indisposition, such as epilepsy, he ought to state this circumstance to the Court, in order that he may be relieved from serving. Much inconvenience and trouble have been experienced from persons of this description being put on the jury in long and important trials.

[2] See above, p. 7.

[3] "The Lord Justice-Clerk and Lords Commissioners of Justiciary find the libel against the pannel relevant to infer the pains of law; but, allow the pannel a proof in exculpation and alleviation, and remit him with the libel, as found relevant, to the knowledge of an assize."

ferred to them, according to the unbiassed dictates of their own consciences.[1]

1. On this ground, then, it is fixed that no adjournment of the diet can take place after the assize are sworn, as the jurymen, in consequence of such a proceeding, would return into a state of intercourse with society, and thus be exposed to the importunities of parties, and the contagion of rumours and opinions respecting the trial.[2] Even where the trial is interrupted by an unavoidable accident, as, for instance, the sudden illness of a juryman, the course followed by the Court is to discharge the assize, and subject the pannel to a new trial; the whole proceedings subsequent to the interlocutor of relevancy being, in such a case, held to be null.[3] This was accordingly done in the case of Mary Elder (1827) for murder, where, after eleven witnesses had given their evidence, one of the assize was suddenly seized with a fit of epilepsy, from which, after more than half an hour, he was so imperfectly recovered, as to make it unfit that he should attempt to officiate farther. The Court thereupon discharged the jury, and continued the diet against the prisoner; and at next sederunt, a new jury being balloted from the same list of forty-five, the trial was proceeded with anew.[4] In one or two cases, an adjournment has been allowed, on account of the great compass and extent of the proof, and the protracted nature of the trial. The propriety of such a proceeding is, however, questionable, as being founded in considerations of convenience rather than necessity; and it has never been allowed except in rare cases, and with great difficulty.[5]

2. It is farther essential, that each of the jurors continue present during the whole course of the trial, and that no person be allowed to hold private intercourse with them, either in presence of the Court or otherwise.[6] If a juror wishes to retire, he ought to intimate this to the Court, when an officer will be directed to attend him, and the proceedings stopped till his return. It is to be observed, however, that when any irregularity takes place in regard to these particulars, it is always matter for inquiry on the state of the facts, and the principles of substantial justice, whether it be of an excusable nature, or so material as to annul the process. Accordingly, in the case of M'Naughton, (1767,) it was

[1] 2 Hume, 414. [2] Id. 415. [3] Ibid.

[4] Syme, 71.—A similar proceeding took place in the case of Pringle, (11th Nov. 1830,) where a juryman was seized with a severe epileptic fit while a witness was under examination.—Unreported.

[5] 2 Hume, 417. [6] Ibid.

held, that the unauthorized absence of a juryman for a minute or two for necessary purposes, though certainly blameable, did not annul the proceedings.[1] Of course, where intercourse takes place with the jury, in consequence of unavoidable necessity, it will form no ground of objection to the trial. Thus, in the case of M'Kenzie, (1827,) while the jury were in the box in Court deliberating on their verdict, one of their number was taken ill. A surgeon having gone to him, and reported, the Court ordained the jury to inclose, and return their verdict next day, and, in the meantime, gave direction for such medical assistance as the juryman might require.[2]

3. Where the jury *retire* to consider of their verdict, the reasons for prohibiting intercourse operate with additional force, as they are then removed from the immediate observation of the Court and the public. Accordingly, the prohibition in this case has not, as in the former, been rested merely on the common law, but has been expressly fixed by statute. The act 1587, c. 92, provides, that when the jury retire to consider of their verdict, they are to be inclosed in an apartment by themselves, and kept there till they be agreed on their verdict; and that no person whatever shall hold any intercourse with them during that time, otherwise the proceedings shall be annulled, and the prisoner held not guilty,—the jury themselves being entitled to apply the act by returning a verdict to that effect. The conduct of the assize, during their inclosure, is thus fixed by a positive enactment, and if any intercourse, therefore, takes place, the law, in the ordinary case, presumes an irregular purpose, and does not require, as with respect to the period before inclosing, (where all is ruled by the common law,) any special proof to that effect.[3] In the case of Sanderson, (1739,) the statute was accordingly applied, and the conviction annulled, because a Sheriff's officer had more than once entered the apartment, and one of the jury had left it and spoken to some one without, though there was no evidence of anything partial or suspicious in the conversation held with him on that occasion.[4] In the case of Kirkpatrick and Others, (1760,) it appeared that the jury, being in want of pens, called for them to the officer without, who thrust some quills into the apartment for them under the door. The Court held, that this irregularity did not annul the proceedings, as nothing had passed but what was necessary to enable the jury to return their verdict. It is not, however, to

[1] 2 Hume, 418. [2] Syme, 172. [3] 2 Hume, 420. [4] Maclaurin, 86.

be inferred, that a similar judgment would be given in any case of unnecessary intercourse, however transient and trifling: for it easily may, and always ought to be avoided.[1] If the jury, after retiring from the court-room, unnecessarily delay to inclose, the statute will be held to apply to them, in the same way as if they were actually inclosed. Any intercourse, therefore, taking place in that situation, will be held to annul the proceedings. In the case of M'Callum and Menzies, (1800,) it appeared, that when the jury retired to their chamber to be inclosed, one of their number was discovered to be absent, and after about a quarter of an hour, this person was found in his lodgings in the town. The jury then inclosed, and returned a verdict of guilty; but this verdict was annulled by the Court, on the ground of an infringement of the statute.[2] It is not, however, true, that any slight intercourse which takes place with the jury, under the eye of the public, and in passing to their place of inclosure, will be fatal to the proceedings. In the case of M'Naughton, (1767,) already referred to, it appeared, that, after the order to inclose, the jury remained in Court for ten or fifteen minutes, collecting their notes and the necessary articles for their sitting, and that some transient conversation took place with some of them as they were passing through the audience to inclose. The Court held, that these circumstances did not form an objection to the verdict.[3] In the case of Thomson and Neilson, (1806,) after the order to inclose had been pronounced, and the Court had removed, one of the jurymen left the court-room, unattended, and went to a tavern about a hundred yards distant, and was absent about fifteen or twenty minutes. His absence had been immediately observed, and the other jurymen had, in the meanwhile, remained constantly in the court-room, with the clerks and macers, who did not suffer any one to have access to them. In these circumstances, the Court, *by a narrow majority*, held that the act 1587 did not apply. The prisoners, accordingly, had sentence of death; but afterwards received a transportation pardon.[4] The operation of the statute continues till the jury have returned their verdict to the Court; which must be done by their chancellor,[5] and in the presence of the whole jurors.[6] In the case of a *written* verdict, (which, how-

[1] 2 Hume, 420. [2] Id. 421. [3] Id. 422. [4] Ibid.

[5] In all cases, the jury ought to nominate one of their number as their chancellor—his duty being to communicate the verdict to the Court. In the case of a written verdict, they must also nominate a clerk, who reduces the verdict into writing, and authenticates it, along with the chancellor, by his subscription.—See below, "Verdict."

[6] 6th Geo. IV. c. 22, § 20.

ever, is only competent where the Court has adjourned,) the jury are relieved so soon as the verdict has been committed to writing, and authenticated by the hands of their chancellor and clerk.[1] It is scarcely necessary to say, that, *in any situation*, where intercourse takes place with the assize, by the contrivance of the pannel or his friends, and in order to procure his release, it will have no effect in annulling the verdict.

The jury are in all cases entitled to deliberate on their verdict, and make their return, without quitting the court-room: If, however, their deliberation is likely to extend beyond a very few minutes, the proper course is to retire; and on their expressing a wish to do so, an interlocutor to that effect is pronounced by the Court.[2] In all cases, the jury, before entering on the consideration of their verdict, enjoy the important advantage of having the evidence summed up to them by the presiding judge, accompanied with an exposition of the law of the case, where such seems to be necessary. Such expositions, of course, are offered by the Court, with a view to instruct the jury, and not in any respect to control them; for the jury are undoubtedly exclusive masters of the case, both in regard to fact and law. The value of such expositions, however, in correcting the exaggerated representations of parties, and leading to a just view of the case, can scarcely be estimated by the jury too highly. It may be added, that where any points occur which the jury are desirous of having explained, they ought to intimate their wish to the Court, before entering on the consideration of their verdict.[3]

[1] 2 Hume, 423. [2] 1587, c. 92. [3] Ibid.

PART II.

OF THE NATURE AND PRINCIPLES OF EVIDENCE AS LAID BEFORE THE JURY.

HAVING explained the constitution of the jury, the next matter for consideration is the nature of the evidence laid before them, as forming the basis upon which their judgment is founded.

A jury is not entitled, in any case, to convict, except on such proof as is external to themselves, and arises from testimonies of guilt formally produced to them, and not from their own private knowledge. Where the evidence produced, therefore, is insufficient, a jury cannot convict, even though the individuals composing it should privately know that the prisoner is guilty. It is not, however, true, that a jury may convict on evidence, however decisive in appearance, which is in any way known to themselves, or any of them, to be false and inconclusive.[1] No evidence can be founded on in a criminal trial, unless it is taken in open Court, before the parties, and the assize, who are charged with the pannel; for it is only by observing the words, manner, aspect, and countenance of the several witnesses, that their credit can be accurately judged of; and besides, the assize ought to have an opportunity of eliciting the truth from the witnesses by putting questions of their own.[2] Accordingly, it is fixed by statute 1587, c. 91, taken in connection with the subsequent act, c. 92, of which it forms a part,[3] that if any piece of evidence be privately insinuated to the jury, the whole proceedings are annulled.

Evidence may be considered in two points of view:—First, with reference to its *substance*, or the materials of which it consists; and, secondly, with reference to its *sufficiency*, or capability of establishing the point at issue.

Attending to this distinction, the first of the following chapters will point out the different kinds of evidence which may competently be produced on the trial; and the second will explain the grounds upon which the sufficiency of that evidence, as proof of the fact at issue, may be judged of by the jury.

[1] 2 Hume, 319. Id. 404. [3] Id. 405.

CHAPTER I.

SUBSTANCE OF EVIDENCE.

UNDER this head will be considered, 1st, The evidence for the prosecution, as consisting of the testimony of witnesses, and the exhibition of writings and other articles; 2dly, The evidence for the defence; and, 3dly, The nature of the *facts* which may competently be detailed in evidence by the witnesses on either side.

SECTION I.

EVIDENCE FOR THE PROSECUTION.

1.—*Evidence of Witnesses.*

The evidence of witnesses, or parole testimony, is the most usual means of proof in crimes.

1. *Admissibility of Witnesses.*—(1.) *Idiotry and Furiosity.*—Idiots and furious persons are excluded from giving evidence, whether they are constantly in that state, or at such short intervals that they cannot safely be relied on. One who is deranged only at long intervals may probably be received, at least *cum nota*, as to any matter which occurred when he was in health, especially if it be recent, and provided no fit of derangement have intervened.[1] (2.) *Deaf and Dumb.*—A deaf and dumb person may be received to give evidence through an interpreter, the Court being satisfied of his capacity.[2] (3.) *Non-age.*—Children, whether male or female, under twelve years of age, are not admissible as witnesses *on oath*, but they may be examined without an oath, the jury being left to judge of the effect of their declarations. The declaration of a child so young as six has been received.[3] It seems to be competent to the Court, to take the declarations of persons between twelve and fourteen. The rule as to putting the oath, is to be taken from the age of the witness *at the time of the trial*, provided the facts occurred not very long before, and were such as the child might easily understand at the time.[4] (4.) *Relationship.*—If the Lord Advocate is sole prosecutor, his nearest relations are lawful witnesses. He may even call the nearest relations of the

[1] 2 Hume, 340. [2] Ibid. [3] Id. 341. [4] Id. 342.

party injured, and that party himself if alive; and this is true even with respect to personal injuries, which the sufferer and his kinsmen must be supposed to feel most severely. The situation of the witness in such cases may sometimes affect his credibility, and make him admissible only *cum nota*, but not entirely set him aside.[1] Accordingly, the widow and daughter of a person killed have been received as witnesses in prosecuting for the homicide,—the mother of a bastard child in prosecuting for its murder,—and the parents of the injured female in prosecuting for rape. Where the private party is prosecutor,[2] and where he insists for damages, or some other interest for which the Lord Advocate could not insist, it seems probable that his nearest relations are receivable only from necessity, and even then *cum nota*.[3] Where he insists for the ends of public example, there is less ground for exclusion. In such a case, the husband of the prosecutor's bastard daughter has been received.[4] Where the prosecution is at the joint instance of the Lord Advocate and the party injured, the case seems to be nearly allied to that of a prosecution at the instance of the Lord Advocate alone. In one instance of this kind, the wife of the prosecutor for an assault was admitted *cum nota*.[5] The pannel's relations are, in general, competent witnesses *against* him; thus, a sister has been received against her brother, and a stepmother against her stepson. A child is a *competent* witness against his parent, but he has the option of declining to give evidence. If under pupillarity, he is *incompetent*, because he is held incapable of exercising the option.[6] In one case, a father was held to have the option, and accordingly declined giving evidence against his son. Baron Hume seems to disapprove of this judgment. A wife cannot be received against her husband, even though willing, and the same rule applies to the husband as against the wife.[8] It was found in one case, that the wife of the pannel may be brought into Court to be identified by other witnesses.[9] There is no exclusion where the wife or husband is the party injured; as, for instance, in a case of assault by the husband on the wife, the prosecution being at the instance of the Lord Advocate. In a case of bigamy, the wo-

[1] 2 Hume, 343.
[2] The private prosecutor cannot insist without the *concourse* of the Lord Advocate, which he receives by the Lord Advocate, or his depute, subscribing the bill for the criminal letters.
[3] 2 Hume, 344. [4] Id 344-5. [5] Id. 345-6.
[6] Id. 346-7. [7] Ibid. [8] Id. 349—Burnett, 432.—Shaw, 217.
[9] Case of Larg and Mitchell, 1817.—2 Hume, 349.

man first married is not a competent witness to prove the marriage, because the marriage may be proved otherwise.[1] (5.) *Professional Confidence.*—The pannel's agent and counsel in the trial cannot be examined against him as to matters which have come to their knowledge in their professional character; but they may be examined as to other matters.[2] The clergyman and physician who have attended him may be examined; but not perhaps the clergyman as to confessions of guilt made to him in prison.[3] (6.) *Partial Counsel.*—A witness is disqualified who has assumed, in any material degree, the character of agent for the prosecutor, as by searching for evidence, preparing the charge, or the like; at least if he was therein countenanced by the prosecutor. The reason is, that the witness is thus held to indicate a corrupt and undue zeal for the condemnation of the pannel. In one case, a man, who had furnished materials for an unfavourable statement against the pannels, was admitted, reserving his credibility to the assize.[4] It often happens, that objections of this kind go to discredit, and not to disqualify, the witness. It is no disqualification that the witness has been the informer against the pannel, even where he is not the injured party.[5] (7.) *Infamy.*—This ground of exclusion exists where the witness has been convicted of an infamous crime by the verdict of a jury. Infamous crimes, in this view, comprehend every species of the *crimen falsi*, such as forgery, perjury, subornation, falsehood, fraud, and wilful imposition, bigamy, and fraudulent bankruptcy; likewise theft and reset; and all capital crimes. They do not include a common assault, or petty riot or breach of the peace, and still less offences against the revenue, as decerned for in Exchequer. Some crimes in this respect are doubtful, such as the crime of violating sepulchres, culpable homicide in its lower degrees, sedition, and participation in a great riot or outrageous assault.[6] Convictions *without a jury*, though they do not disqualify the witness, affect his credibility, and a proof of them will be allowed.[7] The proof of conviction is by an extract, or official copy of the proceedings and sentence, under the hand of the Clerk of Court. If the conviction has taken place in England or Ireland, the proof is by what is termed an exemplification, which is not complete without the seal of Court.[8] Infamy is removed by pardon, the credibility of the witness being reserved to the jury. A person who has served out his term of transportation still remains an incompetent wit-

[1] 2 Hume, 349. [2] Id. 350. [3] Ibid. [4] Id. 351.
[5] 2 Hume, 352. [6] Id. 353. [7] Id. 354. [8] Id. 355.

ness.[1] The Court will not allow a proof of the general bad character of the witness, or even of infamous crimes committed by him, of which he has not been convicted.[2] This sort of infamy is called *infamia facti*; that which proceeds upon conviction, *infamia juris*.[3] The latter only can disqualify a witness, though the former may discredit. *Infamia facti*, though not allowed to be specially proved, can often be brought out by proper questions put to the witness himself, or to other witnesses in the course of the trial. It was found in the case of Burke, (1828,) that a witness may be *asked*, on cross-examination, whether he was ever implicated in another crime of the same kind as the one under investigation,—the witness being entitled to decline answering the question. In the case of Lindsay and Others, (1829,) it was found that a witness, on a charge of *rioting*, may be asked, under the same qualification, whether he had ever been engaged in *the lifting of bodies*.[4] (8.) *Enmity to the Pannel.*—The witness to be excluded on this ground must appear, by substantial acts and deeds, to have been in a state of hostility with the pannel; or, at least, a sufficient cause of capital enmity between them must be proved.[5] In one case a witness was held disqualified who had used vindictive expressions against the pannel, had been engaged in various feuds with him, and had once been present at an assault on him. In another case, a witness was set aside who had fired a pistol at the pannel with intent to kill him.[6] The person injured is not disqualified, even though there may have been animosities between him and the pannel previous to the act, though in this case he is not entitled to implicit belief.[7] Bare words of enmity, however violent, if not accompanied by any substantial cause or malicious deed, do not disqualify, but may affect the credibility of the witness. In one case, a witness was admitted who was proved to have said, that he would do all in his power to hang the pannel;[8] and a similar judgment was given in a case where a witness had threatened revenge on being dismissed the pannel's service. Of course, if the witness avows enmity in his examination, *in initialibus*, he will be excluded, unless the enmity is not of that degree to induce him to swear falsely.[9] (9.) *Interest in the Conviction.*—It may be doubted whether, in a case of deforcement, the party whose diligence has been hindered is a competent, or at least unsuspected, witness,

1 2 Hume, 336.
2 Id. 352-3.
3 Burnett, 397.
4 Alison, 216.
5 2 Hume, 363.
6 Ibid.
7 2 Hume 357-8.
8 Id. 359.
9 Id. 361.

unless he renounce that interest which the statutes give him in the goods of the convict, as escheated, and for payment of his debt.[1] The same thing may be said as to an informer who has a claim as such, under any statute, to a reward on conviction of the pannel; or in terms of the special offer of the party injured, or the like. In the case of Crossan, (1817,) a witness in such a situation was received, reserving his credibility to the jury.[2]—No disqualification lies in the interest of the person injured to recover his property from the criminal.—One whose name has been forged as acceptor or indorser of a bill is admissible to prove the forgery, reserving his credibility to the jury. This was held in the leading case of Wilson, 1790. Cases of this kind are peculiar, for not only the pannel's guilt, but even the *corpus delicti*, may depend solely on the witness, and be known with certainty to him alone.[3] Of course, more remote sorts of interest do not exclude; as, for instance, the interest of the jailor, in a case of prison-breaking; of shepherds, in a case of sheep-stealing; and probably of the messenger and his assistants, in a case of deforcement.[4]—Where the pannel raises a libel of recrimination against some of the witnesses for the prosecution, the Court will admit the witnesses *cum nota*, or conjoin the two processes, according to the circumstances of the case.[5] (10.) *Associate in the Crime.*—A *socius criminis* is an admissible witness, the jury, of course, being the judges of his credibility. It has sometimes been argued, that such a witness is disqualified, as having an interest to convict his associate, in order to recommend himself to the prosecutor; but this is not true, as the prosecutor, by the very act of calling him as a witness, discharges all title to molest him for the future with regard to the matter libelled. This is generally explained to the witness by the Court before he gives his evidence.[6]

Any objection to a witness must be stated when he comes into Court, and before he is sworn. In one case, a witness, *after being sworn*, confessed that she had been convicted of reset. The Lord Advocate, on the suggestion of the bench, consented to her being withdrawn; Adams and Reid, 1828.[7]

2. *Mode of Examining Witnesses.*—A witness in a criminal trial must always be sworn; even a peer. A Quaker, however, is admissible without taking the oath.[8] After being sworn, the witness has next to *purge* himself (as it is called) of all suspicion of instruction how to depone; of the receipt

[1] 2 Hume, 364. [2] Ibid. [3] Id. 365. [4] Ibid. [5] Id. 366.
[6] Hume, 367. [7] Id. 376. [8] 9th Geo. IV. c 29, § 13.

or promise of any reward for his evidence; and of malice or ill-will against the prisoner. Instruction how to depone includes any tutoring that may give a bias to the witness in telling his story, such as furnishing him with notes and observations on the case, taking written narratives from him of what he can say, and the like. These practices may not always disqualify, but they will frequently affect the credit of the witness, and perhaps produce a recommendation to the jury to weigh his testimony. If the witness, *in initialibus*, prevaricate as to these practices, he will be excluded.[1] If the prosecutor has offered a reward to the witness, his evidence is excluded, whether he has accepted it or not; but not if the bribe has been offered by another, as, for instance, a magistrate. The promise to the witness of future pardon for his crimes is to be regarded as a bribe, but not so an unconditional pardon already procured.[2]—As to malice and ill-will, enough has already been said.

To prevent bias, the witnesses are shut up and examined separately; and a witness is objectionable if he has heard any part of the preceding evidence. This is true also of the pannel's witnesses in regard to the evidence for the prosecution.[3] Witnesses ought to be precognosced separately; but it will not disqualify a witness that he was present at the precognition of the other witnesses, if his attendance there was natural, and without any improper motive.[4] A witness, after giving evidence on the trial, may be recalled and re-examined, if kept in a separate room during the interval. A witness may refresh his memory with notes, but cannot be allowed to read them as evidence.[5] The declaration of the witness taken at the precognition may be cancelled, if he chooses, before he depones; it cannot be used against him in any way, nor even produced on the trial to shew that he had formerly given a different account of the matter. Still less, in the ordinary case, can verbal testimony to that effect be received.[6]—The practice formerly observed, of taking down the depositions of witnesses in writing, was dispensed with by statute, under the provision, that the evidence should be summed up to the jury, by one of the judges, at the conclusion of the proof.[7]

[1] 2 Hume, 378. [2] Id. 377. [3] Id. 379.
[4] 2 Hume, 379-80. [5] Id. 381. [6] Ibid.
[7] 21st Geo. II. c. 19, and 23d Geo. III. c. 45.—If a witness fail to attend, or to offer a sufficient excuse, he incurs a fine, or *unlaw*, as it is called, of 100 merks. 2 Hume, 373.—Witnesses, in their attendance, are protected by the Court against execution for debt. If they mean to abscond, they may be imprisoned, till they find caution for their appearance. The like aid is given to the pannel to secure the attendance of his witnesses.

2. *Evidence of Writings, and other Articles.*

Another kind of evidence, on the part of the prosecutor, consists of writings and other articles exhibited in the hands of the Clerk of Court, such as the prisoner's declaration, the forged writings, the stolen goods, the instruments of murder, or the like.—These productions do not constitute proof by themselves, but only when authenticated by the testimony of witnesses.

Prisoner's Declaration.—In almost every case, the declaration of the prisoner is founded on as a piece of evidence. It consists of the prisoner's statement of his case taken down in writing, on his examination, before a magistrate, after his apprehension.[1] At the time of emiting the declaration, the prisoner must be in his sound senses, not disordered by liquor, nor under the influence of threats or promises. The prisoner may decline making any answer on his examination; and he ought to be informed of his privilege in this respect by the magistrate who examines him. He ought also to be warned, that his declaration may be used against him on his trial. The declaration ought to be taken down at large in writing, and read over to the prisoner, and signed by him and the magistrate; or, if the prisoner cannot, or will not, sign it, by the magistrate in his stead, the reason of his not signing it being set forth;[2] the whole in presence of two witnesses, who have heard the examination, and put their names to the writing, that, if necessary, on the trial, they may authenticate it, and swear to all that passed on the occasion.[3] The examination must take place in presence of the magistrate, and not merely of a clerk or other inferior person.[4] If not acknowledged by the pannel in presence of the jury, the declaration must be proved by the testimony of *two* witnesses on oath. The witnesses must identify the writing as the declaration of the pannel, so that these only seem to be competent witnesses in this respect, who have cause of knowledge of the particular paper, such as the magistrate by whom it was taken, the clerk who wrote it, and the witnesses who authenticated it, with their subscription.[5] In one case, the declaration was held proved, though one of the witnesses had not signed it—the declaration being short, and the witness swearing positively to the contents.[6] The witnesses must be

2 Hume, 374-5.—The expenses of the witnesses are paid at a proper rate by the parties at whose instance they are cited, and in case of refusal, horning issues against these parties, to compel payment.—2 Hume, 382.

[1] 2 Hume, 80. [2] Id. 330. [3] Id. 80-1.
[4] 2 Hume, 327. [5] Id. 327-29. [6] Syme, App. 44.

able to swear that the declaration was freely emitted, in sobriety and sound mind, and without threat or promise. In one case, the declaration was rejected, as it did not bear to have been emitted in sound mind, and the magistrate swore that this was purposely omitted. The pannel is entitled to produce proof as to the way in which the declaration was emitted, as under a fit of derangement, or in consequence of threats, or the like.[1] Thus, a female pannel has been allowed to prove that she laboured under hysteria at the time of examination.[2] Something much short of a threat or promise used towards the prisoner may vitiate a declaration. In one case, a magistrate, in taking a declaration, told the prisoner that he was at liberty to say what he liked, *but the more candid he was, it would be the better for himself.* The declaration was rejected on this account, and a second declaration, in the same case, was also rejected, though it had been taken by a different person, and with only the usual caution, it being held that, as the prisoner, in it, adhered to his former declaration, he was to be understood as having acted under the same influence.[3] If, however, the promise is made, not by the magistrate, but merely by a sheriff-officer, or by the person injured, it does not affect the declaration.[4] It is not necessary to state in the declaration that the prisoner was warned of the use that might be made of it, and of his privilege of not answering, nor are these things proved by the prosecutor in common course at the trial; nor is it essential, though common, to set forth that the declaration was read over to the prisoner, but this, if seriously denied, must be proved.[5] Declarations may be taken either before or after commitment for trial, and as long as the libel is not served. A posterior declaration is vitiated by a refusal, at the time of taking it, to read to the prisoner the prior ones,[6] though such a declaration need not *bear* that the former ones were read.[7] It is doubtful whether it is indispensable to read the prior declaration, *though not required by the prisoner;* or where the posterior declaration is taken *at the prisoner's desire.*[8] The prisoner may demand re-examination till his indictment is served; but how far recantations so made are to be credited, it is for the jury to determine. A prior declaration, if taken before a competent magistrate, is sufficiently proved, if admitted in the second, and do-quetted as relative thereto.[9] In one case, the prosecutor,

1 2 Hume, 328. 2 Syme, No. 54.
3 Trials for Treason in Scotland, Vol. II. p. 45-170.
4 2 Hume, 327-8. 5 Id. 330. 6 Id. 326.
7 Shaw, No. 56. 8 2 Hume, 331. 9 Id. 329.

though he had libelled on two declarations, was allowed to prove the first without the second, though the pannel objected that they should be taken as a whole.[1] In a subsequent case, the prosecutor was not allowed to prove the second without the first, though he had not libelled on the first.[2] This last case has not been followed as a precedent, and it seems to be disapproved of by Baron Hume.[3] If extant, and recoverable, the *written* declaration, as the best evidence, must be produced, in preference to oral evidence of what passed before the magistrate. It is doubtful whether such oral evidence could be received, in the event of the declaration being rejected by the Court.[4] A declaration, not impeached generally, as to the manner of taking it, cannot be challenged in the way of parole evidence, on the ground that certain parts of it do not express what the prisoner meant to say.[5]—A confession of guilt contained in a declaration, is not of itself a sufficient ground of conviction;[6] but it is a circumstance of evidence, of a very strong kind, in the prosecutor's proof. A declaration, though denying the crime, is often very material, as containing false statements on the part of the prisoner, especially as to where he was, and how employed, when the offence was committed. A declaration is always evidence *against* the prisoner, it can never be evidence *for* him; because a man cannot be presumed to falsify against himself, though he may be presumed to do so in his own favour. Credit is therefore due to the declaration in the former case, but not in the latter.[7] The admissions of the prisoner, in his declaration, must be taken with all their qualities, as he has given them; but any favourable particulars of that kind are, of course, liable to be overcome by the other evidence or presumptions of the case.[8] The declaration of the prisoner is not evidence *against* any other pannel; as, in that respect, it can be entitled to no credit.[9] It may sometimes, perhaps, be evidence *in favour* of such pannel, as where A and B are accused of the same crime, and A acknowledges his guilt, and exculpates B.[10] As declarations are merely answers to questions put by the magistrate, the *omission* of circumstances, afterwards proved against the prisoner, ought not, in general, to militate against him.[11]—In one case, where the crime was that of sinking insured ships, to defraud the underwriters, declarations were received in evidence, though emitted in a civil action, at instance of the

[1] Case of Anderson, 1799. [2] Case of Whyte, 1814.
[3] 2 Hume, 326. [4] Id. 332. [5] Ibid.
[6] 2 Hume, 324.—Burnett, 486. [7] 2 Hume, 327.—Burnett, 493.
[8] 2 Hume, 327. [9] Ibid. [10] Burnett, 494. [11] Ibid.

pannels, for recovery of the value under the policy of insurance.[1]

Dying Declaration.—In cases of homicide, the statement given on death-bed by the person killed, with regard to the circumstances of the injury, is sometimes reduced into writing, and produced as evidence on the trial. Testimony of this kind, delivered on so serious an occasion, is entitled to considerable weight, though it is not of equal value with an oath emitted before the assize.[2] A dying declaration is admissible, though not authenticated in the same formal way as a pannel's declaration, if it is proved to have been freely given, and fairly taken down, and to have come from a person in his sound senses.[3] In some cases, the dying person has verified his declaration by *an oath*, in presence of a justice of peace. It is not necessary that the dying person should have *no hopes of recovery* at the time of emitting the declaration.[4] In a case of forcible *abduction*, a declaration was produced, which had been emitted by the injured female, while suffering under the injuries which she had sustained, though no charge of *homicide* was made.[5] As the mind of a person on death-bed is generally enfeebled, his declaration is of greater weight as it regards *facts*, than as it regards matters of *judgment* or *opinion*.[6] If the person emitting the declaration recovers, the declaration cannot be produced, even with consent of the prosecutor.[7] Where the declaration is favourable to the pannel, he may refer to it in his defence.—In the trial of a revenue officer, for murder, he was allowed to produce the declaration of one of his own party, also accused of the murder, and since dead; but this was an extraordinary indulgence, and only granted of consent.[8]

Medical Certificates.—In cases of homicide, and other crimes, against the person, certificates by medical persons, respecting the nature of the injuries, are generally produced in evidence. These must be verified on oath by the medical persons who have granted them.[9]

Written Oath in Perjury.—In cases of perjury, the written oath signed by the pannel, or by the judge in his stead, is

[1] Case of M'Iver and M'Callum, 1784.—2 Hume, 326.
[2] 2 Hume, 407. [3] Ibid.
[4] 2 Hume, 407.—Paris and Fonblanque observe, that to require such a state of mind on the part of the injured person, would generally exclude dying declarations.—"Hope is the latest faculty of the human mind. 'I am better,' has not unfrequently been the last articulation of expiring nature."—Paris & Fon. Med. Juris. i. 165.
[5] Case of M'Gregor, 1752.—2 Hume, 409. [6] Burnett, 499.
[7] 2 Hume, 410. [8] Case of Reid, 1784.—2 Hume, 410.
[9] Burnett, 486.

produced, and authenticated by the judge's deposition, if he is alive. This is true, however, only of those cases where, regularly and in common course, the oath is reduced to writing.[1]

Forged Writings.—In cases of forgery, the forged writings are produced. In proving them to be forged, it is not perhaps indispensable to adduce, as witnesses, the officers who sign the genuine notes; persons who are well acquainted with their writing, especially if the officers be dead, may be sufficient.[2]

Letters and other Documents.—Writings of various kinds may be produced, according to the circumstances of the case, such as letters of correspondence, memorandums, minutes, certificates, and the like. The letter of a third party, found in the possession of the pannel, and addressed to him, is not, of itself, evidence of its contents against him; for it may have been sent to him by mistake, or out of malice. A letter *from* the pannel, though found in his own possession—and much more if it has passed out of his hands—is evidence against him.[3] Greater latitude is allowed in the production of writings, where the object is to prove the quality of the act, and not the share which the pannel took in it Thus, writings may be produced, to shew that a certain proceeding was treasonable or seditious, though they are not under the pannel's hand, and have never even been in his possession.[4]

Extract of Previous Conviction.—Where previous convictions are charged against the prisoner, an extract of the proceedings and sentence, under the hand of the Clerk of Court, is produced. It is not necessary to authenticate the extract by the deposition of the clerk; but there must be oral evidence to shew that it applies to the prisoner. An extract, or copy, of an English record, cannot be received, unless it be authenticated by the seal of Court.[5]

Proof of Hand-Writing.—It is necessary to distinguish the different ways in which witnesses may swear to the pannel's hand. (1.) It is good evidence, if a witness swear to the writing as the pannel's, in consequence of his having frequently seen the pannel write, and thus gained a knowledge of his hand. (2.) Next in degree is the evidence of one who has received, or had occasion to see, letters from the pannel, which can reasonably be made out, or probably be

[1] 1 Hume, 375.—See below, "Evidence in Perjury."
[2] 2 Hume, 395.—See below, "Evidence in Forgery."
[3] 2 Hume, 395. [4] Ibid. [5] Burnett, 483.—See before, p. 17.

inferred to have been written by him. (3.) Evidence of a much less conclusive kind, is that of *comparatio literarum*, which consists merely of the opinion of skilful persons, such as writing-masters, or engravers, who have no previous knowledge of the pannel's hand, and judge only on comparison of the writing in question, with other writings of his, proved to be genuine; this sort of evidence, though inconclusive in itself, may be sufficient, when strengthened with other circumstances, as, for instance, where the writing consists of the minutes of a treasonable meeting, and the pannel is proved to have acted as clerk to the meeting.[1] In a trial for writing an incendiary letter, besides the evidence of *comparatio literarum*, it was proved that the pannel, on the day when the crime was committed, had bought a sheet of paper of the precise same fabric with that on which the letter was written, and was unable to state how he had disposed of it.[2] Sometimes there may be confirmatory circumstances in the body of the writing itself, distinct from the penmanship, as, for instance, the use of anomalous phrases, or peculiarities of spelling. The jury, of course, in matters of this kind, will always examine for themselves the writings in question.

Identification of Writings, &c.—In order to enable the witnesses to identify writings, and other articles, produced at the trial, these ought to be marked by the witnesses at the time they are found, in such a way as to be easily afterwards distinguished. This is usually done by sealing, and affixing labels to the articles, bearing the signature of the witness, to which he can swear. The articles ought also to be committed to the care of the Sheriff-clerk, or some trustworthy person, who can appear at the trial, if necessary, and swear to their having continued in his custody till the time of the trial.[3]

Notice to Pannel of Productions.—No writing or other article can be used in evidence against the pannel, unless warning is given in the libel of the prosecutor's intention so to use it,[4] and unless it is lodged with the Clerk of Court at such time before the trial, as allows the pannel sufficiently to examine it.[5] If the articles in the hands of the clerk are sealed up, the pannel is entitled to apply to the Court for a

[1] 2 Hume, 395. [2] Case of Jaffray, 1815.—2 Hume, 395.
[3] Rules to be observed in taking precognitions, &c. 1765.
[4] The style of the notice in the libel is as follows:—"Which declarations, *(or other articles,)* being to be used in evidence against you at your trial, will, for that purpose, be lodged, in due time, with the clerk of the High Court of Justiciary, before which you are to be tried, that you may have an opportunity of seeing the same."
[5] 2 Hume, 388.

warrant to have the seals removed. The prosecutor is therefore bound to lodge the articles with the clerk, even though they should be under seal.[1]—If the libel, besides giving the notice, particularly describes the article to be produced, and if the description is erroneous, the article cannot be used in evidence.[2] In certain cases, a particular description is necessary, as, for instance, in forgery and perjury, where the chief circumstances and characters of the false instrument, or oath, must be set forth. The same thing is true with regard to the pannel's declarations, and extracts of previous convictions against him; these must be described by their dates, and the magistrates before whom they took place.[3] In regard to stolen goods, instruments of murder, and the like, it is sufficient that they are mentioned in general terms, as, "a pistol," "a bludgeon," "several of the goods stolen." In cases of theft, production of the stolen goods is not essential, and evidence may be produced in regard to them, though the libel has not described them in such a way as to distinguish them from all other articles of the same kind.[4]—A witness, in deponing, may produce an article, though the libel has given no notice concerning it, for the purpose of illustrating his own evidence, but he cannot leave it in the hands of the clerk, so as to become part of the process, and be sworn to by other witnesses.[5] On this principle, a witness, who has been rejected as inadmissible, may be pointed out, among the bystanders, and identified by a subsequent witness.[6] And thus also, in one case, the wife of the pannel, though, of course, an incompetent witness, was allowed to be brought into Court, and sworn to by the other witnesses.[7]

SECTION II.

EVIDENCE FOR THE DEFENCE.

In regard to the evidence produced on the part of the prisoner, little requires to be said, as the rules applicable to the case of the prosecutor are, for the most part, observed. The disqualifications of witnesses arising from defect of intellect, infamous character, receipt of reward, and instruction how to depone, are judged of in the same way, on either part.[8] In

[1] 2 Hume, 388. [2] Id. 390. [3] Id. 391.
[4] 2 Hume, 393. [5] Id. 394. [6] Shaw, No. 76.
[7] Case of Lang and Mitchell, 1817.—2 Hume, 349.—When the admissibility of a writing, as an article of evidence, is debated, the party who produces it is not entitled to read it, as it might make an impression on the jury, but he may state generally its import.—Burnett, 506.
[8] 2 Hume, 402.

regard to enmity to the prosecutor, the same strictness does not seem to be necessary as in the case of enmity to the pannel, because malice in this shape is not likely to produce the same degree of evil.[1] The kind of interest which may be chiefly objected to against the pannel's witnesses, is that of their being his associates in the crime libelled. Where several pannels are called in the same libel, the Court sometimes delays the trial of some of them, that they may have the benefit of the testimony of the others, if acquitted. Associates, not yet indicted, have never in any case been offered as witnesses for the pannel; and, if at all admissible, they would not be entitled to much credit.[2] In the case of Clerk and Brown, (1802,) tried on the same libel for robbery, a witness was admitted on the part of Brown, though objected to as tending to criminate Clerk.[3] The admissibility in exculpation of the near relations of the pannel seems not to be the subject of any absolute rule, but matter rather for deliberation on the character and exigency of the particular case. The brothers and sisters of the pannel have been commonly received. In one very peculiar case, a wife was received; it was the trial of James Christie, (1731,) for the murder of a man caught by him in the act of adultery with his wife.[4] In the case of George and Robert Wilson, (1826,) the wife of *George* Wilson was not allowed to be called on the part of *Robert* Wilson, they being under trial for the same act.[5] In some cases, a daughter has been received.[6] In the case of Wilsons, just mentioned, a daughter, *under pupillarity*, was held inadmissible. Mothers have sometimes been received. In one case of trial for murder, a mother was rejected, she having been in some degree the cause of the homicide.[7]

[1] 2 Hume, 402. [2] Ibid. [3] Ibid. [4] Id. 400-1.
[5] Syme, p. 40. [6] 2 Hume, 401.
[7] Case of Muir, 1797.—Ibid.—The pannel is entitled to a precept, or letters of exculpation from the Court, to compel his witnesses to attend; 1672, c. 16. A copy of these letters, and of the list of witnesses, must be served on the prosecutor.—The pannel ought to give in to the Clerk of Court a written statement of his line of defence, and of the particular pleas, if there be any, which he means to maintain; 20th Geo. II. c. 43. This is often neglected in practice. Where defences are given in, they are read to the jury after the pannel has pled to the libel. It is usual for the pannel to give notice of any articles he means to produce, but there is no order of Court as to lodging them. If the pannel has occasion to recover writings in the possession of others, the Court, on his petition, grant diligence against havers.—2 Hume, 400-2.

SECTION III.

NATURE OF THE FACTS WHICH MAY BE DETAILED IN EVIDENCE.

1. FACTS are not admissible in evidence, unless they are pertinent to the issue, either directly, or by near or probable consequence. Circumstances of a *remote tendency*, which are unconnected with the special matter at issue, and create merely a surmise or suspicion in regard to it, are, in general, inadmissible. Thus, it is not allowed, in proof of a specific charge, to bring evidence that the pannel has been guilty of other offences of the same kind.[1] If a person be charged with three acts of theft, a proof of two of them cannot be offered in evidence of his guilt as to the third; nor can a proof of habite and repute, or previous convictions in theft, furnish any evidence as to the act of theft itself, of which these circumstances are stated as aggravations.—It is not allowed, in proof of a specific charge, to bring evidence against the prisoner of his general bad character, whether in respect of temper, dishonesty, or any other vice.[2] There is, of course, an exception in regard to the charge of habite and repute in theft. It is competent to prove, in certain cases of homicide, a vindictive temper, and a series of cruel treatment with respect to the particular individual killed,—as, for instance, a wife or child, or other person under the pannel's power.[3] Such treatment, however, must be set forth in the libel. Proof of character is allowed on the part of the pannel, as, for instance, in homicide on sudden quarrel, that he is of a mild temper, and that the deceased was the reverse. In cases of rape, evidence of the character of the woman, as a person of loose manners, is allowed.[4] Of course, the prosecutor may bring evidence to support the character of the person injured, where it is impeached by the pannel.—The case of Helen Rennie (1822) may be noticed, as illustrating the exclusion of *remote facts*. On her trial for the murder of her child, by giving it king's yellow, which she stated she had mistaken for sulphur, she was not allowed to ask a witness, whether he knew of mistakes occurring at the Apothecaries' Hall as dangerous as that of selling king's yellow for sulphur,—it not having been proved that the king's yellow given to the child had been bought at the Apothecaries' Hall.[5]

[1] Burnett, 611. [2] 2 Hume, 413. [3] Ibid.
[4] 2 Hume, 413. [5] Shaw, 82.

2. Hearsay evidence, or the testimony of one person to an account which he has had from others of the matter in question, is not competent, as it is inferior evidence, and the best ought always to be produced.—(1.) It is competent, where the person from whom the account has been derived is *dead*,[1] especially if he was so circumstanced at the time as to create strong belief that what he said was true.[2] It is necessary, however, that the person whose words are thus reported, would himself, if alive, have been a competent witness. In the case of David Little (Glasgow, Jan. 1831) for stouthrief, certain things spoken by his deceased brother, Matthias Little, were not allowed to be proved, because that person had been outlawed some years before for the same crime, and had never been reponed. He would, therefore, if alive, have been himself inadmissible.[3] In cases of murder, the statements of the sufferer, as to the injuries received by him, are, of course, competent evidence. These statements, as has been seen, are sometimes reduced into writing, and laid before the jury in that shape.[4] The words of the deceased may sometimes form a part of the *res gesta*, or story of the murder, and be admissible, as immediately to be noticed, on that separate ground, as, for example, where he exclaims, on receiving the wound, that the pannel has murdered him. It is not necessary that the statements of the deceased, whether reduced to writing or not, should be uttered in presence of the prisoner, in order to make them admissible.[5] The statements of the deceased may, of course, be proved by the pannel, where they are in his favour.[6] (2.) Hearsay evidence is admissible, where it constitutes a substantial part of the *res gesta*, or fact related; for instance, where the words spoken to the witness are the cause, or motive, of his proceeding to do a certain thing, which he cannot truly and intelligibly describe, without mentioning *why* he came to do it, as where he states that he went in pursuit of a thief, on account of being told by a person he met that a theft had been committed.[7] Thus, in the case of Divan, (1824,) it was held admissible evidence, that the children of the pannel had come to a witness, wringing their hands, and exclaiming that their father had killed their mother, and put her in the bed,—in consequence of which, the witness alarmed the neighbourhood.[8] In cases of riot, evidence is admissible of the words of any of the party with whom the pannel acted,

1 2 Hume, 407,—Mr. Burnett (p. 601) says, perhaps this is true also, where he is *insane*.
2 Burnett, 600.
3 Unreported.
4 See before, p. 24.
5 2 Hume, 407.
6 2 Hume, 409.
7 Id. 406.
8 Unreported.

as shewing the tendency of the riot.[1] And in cases of conspiracy, if a witness is proved to have conversed with the pannel and others, on a certain day, in pursuit of some design, and if it is offered to be proved that, some days previous, the witness conversed with some of the same persons, besides others, (but in absence of the pannel,) in relation to the same design, this is admissible evidence; it is part of the train of the conspiracy with which the pannel is more or less connected by his presence at a different time.[2]—What the pannel has been heard to say is admissible evidence, as his declarations are part of his actings.[3] If, however, the witness cannot identify the pannel at the trial, the evidence cannot be received, for, in that case, it does not appear that the words were spoken by the pannel.[4] It is also competent to prove what any third party said *in presence of the pannel*, as the pannel's conduct on the occasion will shew, whether he denied or acquiesced in it;[5] but, for a similar reason to that just stated, if the pannel is not identified, such evidence cannot be received. It is not competent to prove, *in exculpation*, the pannel's denial of guilt, *at an interval after the fact*, because such denial can be entitled to no credit. His statements, however, *at the time of the fact*, may be competent as part of the *res gesta*. In the case of Wilson (1820) for treason, he was, after debate, found entitled to prove some words he had used to a certain person, who met him in company with the treasonable assembly, and which words indicated that he had been forced to join them.[6] (3.) It is competent to *corroborate* the testimony of a witness, by proving what he said, *de recenti*, in regard to a fact as to which he is called to give evidence.[7] In cases of *rape*, it seems to be competent to *invalidate* the testimony of the injured female by evidence in exculpation of contradictory statements made by her, provided she be previously cross-examined as to these statements, that so she may have an opportunity of explaining the supposed contradiction.[8] In ordinary cases, however, the rule seems to be different. In the case of William Hardie, (1831,) it was found competent to question a witness *himself* as to previous and contradictory accounts which he had given of the story to others, but not to contradict his story by the evidence of others adduced on the prisoner's part.[9]—It may

[1] Burnett, 601.—Syme, 121.
[2] Trials for Treason in Scotland, Vol. II. p. 71.
[3] Burnett, 601. [4] Syme, p. 20. [5] Burnett, 602.
[6] Trials for Treason in Scotland, Vol. II. p. 226.—2 Hume, 401.
[7] Burnett, 602 [8] 2 Hume, 499.—Phillips on Evidence, I, 292.
[9] Alison, 225.—Shaw, 237.—In the case of Brown and Henderson, (9th July, 1832,) for assault, the prosecutor, with a view to ulterior proceedings

be remarked, that in all cases in deponing to conversations, the witness must give the whole words, if he can recollect them; if not, the substance. He is not allowed to give his impressions or understanding of the result; not connected with either the words or the substance.[1]

CHAPTER II.

SUFFICIENCY OF EVIDENCE.

WHAT has been hitherto said relates to the *materials* of evidence, both as regards the witnesses, and the articles produced, and the facts to which the witnesses are allowed to speak. This matter, as has been seen, is for the most part the subject of precise rules, the application of which belongs to the Court. On the other hand, the *sufficiency* of evidence, or its capability to establish the point at issue, is the exclusive province of the jury, and, in their disposal of it, the Court cannot interfere. The sufficiency of evidence is not, generally speaking, the subject of any fixed rules, as every case differs more or less from every other case, both in the situation of the witnesses, and the nature of the facts to which they speak. A jury, therefore, in determining this matter, must be guided, for the most part, by their own judgment and discretion, upon a due consideration of the whole circumstances of the particular case.—The sufficiency of evidence may be regarded as depending, 1*st*, On the credibility of the witnesses; and, 2*dly*, On the tendency or import of their testimony.

SECTION I.

CREDIBILITY OF WITNESSES.

IN considering the credibility of witnesses, it is necessary to attend to their particular characters and circumstances,

against a witness, moved that several of the questions and answers should be reduced into writing. The witness was asked, *inter alia*, Whether, on a certain former occasion, he had recognised the pannel, Henderson, as one of the persons who struck him, and having deponed in the negative, he was farther asked, *Whether on that, or any other occasion, he had stated that he recognised Henderson as one of the persons who struck him?* On an objection by the pannels, the Court held this question incompetent.—Unreported. [1] Trials for Treason in Scotland, Vol. II. p. 518.

and also to the nature of the facts to which they speak. Where a witness of doubtful credibility is admitted to give evidence, the Court sometimes declare him to be received "*cum nota*," or "under reservation of his credibility to the assize,"—phrases which import a recommendation to the jury, on the part of the Court, to be cautious in giving credit to his evidence.[1] More frequently, however, at least in modern practice, a witness, where he is admissible at all, is received without the expression of any qualification of this kind on the part of the Court. It is, of course, always the duty of the jury, in whatever way a witness may be received, to examine his situation and circumstances for themselves, and to attach that degree of weight to his testimony which they may think proper.

Ability of Witnesses.

In relying upon a witness, the jury must be satisfied of his *ability* to state the facts accurately. The ability of the witness may depend upon various circumstances, either relating to himself, or to the fact which he has observed. In the first place, his general intelligence may be remarked, as apparent in his demeanour in giving evidence. There are various degrees of intellectual weakness, which, though they do not exclude a witness, must, in some degree, discredit his testimony; and these, so far as they can be ascertained, ought to be carefully distinguished by the jury. Any special defect in the witness's powers of observation should likewise be noticed, such as partial blindness, deafness, and the like.[2] It is also important to inquire, whether any temporary incapacity existed at the time when the witness's observations were made, as, for instance, *intoxication*. In criminal trials, evidence of this kind is unfortunately extremely frequent. The degree of intoxication will be most accurately learned by ascertaining the nature and quantity of the liquors made use of, for a witness is generally averse to confess that he was intoxicated. It is to be observed, besides, that witnesses in the lower ranks of life, in general, apply the terms of intoxication and drunkenness only to the more advanced stages of inebriety. Thus it is sometimes stated by such witnesses, that a person was

[1] 2 Hume, 378.

[2] Some individuals have peculiarities of organic conformation, which must be kept in view. There are some who cannot distinguish certain colours, or are not affected by them like the generality of men. In cases where the prisoner is sought to be identified by the colour of his dress, this observation may be of some moment.—See Bentham's Judicial Evidence, p. 22.

not intoxicated, *because he could keep his feet.*—It is necessary also to attend to the nature of the fact stated by the witness, and the opportunities which he had of observing it; whether it was done suddenly, as often happens in cases of culpable homicide, and assault in sudden quarrels,—whether it took place in a crowd, or confused assemblage of persons,—whether it was seen by the witness at a distance,—or under any other circumstances unfavourable for observation. It should be noticed also, whether the fact was likely to attract the attention of the witness, either as being remarkable in itself, or as having some peculiar interest for him. In this view, it is proper to attend to the witness's previous habits of attention to particular subject-matters, and to ascertain whether the fact is such as falls under the ordinary course of his observation, either professionally or otherwise. A surgeon, for instance, would be likely to observe accurately the symptoms of a wound, and a land-surveyor the apparent distances of objects.[1]—The fact may be one as to which the witness entertains certain prepossessions, or prejudices. His habits of thought and feeling are therefore sometimes important. It often happens, in crimes of an unusual and atrocious nature, that witnesses in the lower ranks of life are biassed in this way. In cases of secret murder, for instance, where suspicion has attached to any particular individual, the circumstances are often unconsciously modified by the imagination of his neighbours, so as to confirm his guilt. In the case of Robert Brown, (12th July, 1824,) who was tried for drowning his illegitimate child, several witnesses swore that they had seen a mark in the mud at the bottom of the stream exactly corresponding to a child's body, and occasioned apparently by the body being pressed strongly against the mud,—the print of the head being deepest. It came out, however, that, previously to this impression being observed, a man on horseback had ridden several times into the stream at this very spot, so that there could be no doubt that the mark observed by the witnesses was occasioned by the horse's feet, and that their prepossessions against the prisoner had converted it into an indication of his guilt.[2]—It is probably in this way that we are to account for much of the evidence in the ancient trials for witchcraft in this country, and also,

[1] Where a witness testifies to a fact which is the result of reason exercised upon particular circumstances, his reasons for drawing that conclusion are of importance, for the purpose of ascertaining whether his conclusion was correct. This is particularly true with regard to all questions of skill and science.—Starkie's Law of Evidence, 1. 460.

[2] Unreported.

perhaps, for certain preternatural circumstances given in evidence in more recent trials. In the case of Terig and M'Donald, (1754,) for the murder of Serjeant Davis, two witnesses deponed to having seen a spirit or apparition, which told them where the body of the murdered person was to be found, and that the pannels were the murderers.[1] In various cases, evidence has been given as to the bleeding of the corpse, when touched by the murderer. In the case of Standafield, (1688,) for the murder of his father, a surgeon deponed, that when the pannel touched the corpse, "it darted out blood through the linen from the left side of the neck."[2] In a very recent case—the trial of Hugh M'Leod, for the murder of Grant, a pedlar, (Inverness, September, 1831,)—a witness deponed, that he had heard a voice in a dream, that said to him, that the pack of the murdered person was lying near a certain house; the place was not named, but the witness got a sight of the ground in his dream, as if he had been awake; it was "ground fronting the south, with the sun shining on it, and a burn running beneath the house." He had not known the place before, but he went to it in consequence of his dream; and the articles were found near it.[3]—Sometimes the nature of the fact is such as to impress the witness with exaggerated ideas regarding it. The extent of personal injury inflicted upon the witness, in a case of assault or robbery, may be considered as of this kind. In detailing such an injury, the witness naturally copies from the feeling of agitation and alarm which he experienced at the time, and thus the description may be in some degree overcharged. There is, besides, a certain degree of indignation which must lurk in his mind against the author of his sufferings, and which may involuntarily lead him to give a higher degree of colouring to the fact than is warranted by truth.[4] The most accurate knowledge of the injury will generally be obtained by attending to the medical evidence, where it exists, and to the collateral circumstances, as, for instance, the appearance and

[1] Burnett, 529.

[2] Howell's State Trials, Vol. 11. p. 1402.—In an English case, for the murder of a woman of the name of Norkott, in the reign of Charles I. the clergyman of the parish swore, that when the corpse was touched by one of the prisoners, the deceased opened one of her eyes, and shut it again, and thrust out her ring, or marriage finger, and pulled it in again, and the finger dropped blood upon the grass.—Hargrave's State Trials, Vol. 10. App. No. 2, p. 29.

[3] Unreported.

[4] It is to be observed likewise, that in cases of this kind, the witness may have been in some degree incapacitated for accurate observation by terror and alarm. Mr. Justice Bailey, in reference to situations of this kind, remarks, that "Fear has a very different effect upon different persons; in some it prevents the clear perception, whilst in other instances it assists in making an indelible impression."—1 Starkie, 459.

conduct of the injured person immediately after the fact. A case occurred a few years ago, of assault committed upon two excisemen, while engaged in searching for an illicit distillery in a remote part of the country. These individuals deponed, that they had received very severe injuries from the prisoners; in particular, that they had been *knocked down, and kicked, and beat with sticks*; and that this violence had been continued for about *two hours*. It appeared, however, that immediately after the assault, they had walked unassisted to an inn, at some distance, where they refreshed themselves with whisky and water, and that next day they walked home, a distance of six or seven miles. These circumstances rendered it probable that some degree of unconscious exaggeration had pervaded the story of the officers.[1]—Where the injury is inflicted, not upon the witness, but upon some person in whom he is interested, as a friend or relation, the same sort of bias to exaggerate may naturally be supposed to exist.

There are some facts which, from their peculiar nature, are more difficult to be accurately observed and remembered than others. One of these that may be noticed is *Personal Identity*, a fact which very often comes to be of importance in criminal trials. Those matters which are most substantial and clearly defined in themselves, are fitted to make the deepest impression on the mind. A distinct act, which one sees performed, is of this nature, as the firing of a gun, or the knocking down of a man. Personal appearance, as observed by a witness, is of a much more indefinite and evanescent nature, and, accordingly, its effects upon the mind are slighter and more transient.[2]—It is always of peculiar importance, in

[1] These considerations are often of importance in determining the credit due to *Dying Declarations*.—Paris and Fonblanque remark, that "A person acting under the influence of bodily suffering is very apt to fall into numerous fallacies respecting the transactions in which he may have been previously engaged, especially in such cases as usually constitute the objects of medico-judicial inquiry, where the passions not unfrequently increase the natural disturbance of the mind; while the eagerness which is so justly felt for the detection of the author of the injury will tend rather to heighten than to correct any hallucinations under which the sufferer may happen to labour; for on such occasions the imagination is always ready to supply the want of testimony, and to fill up the spaces which actual observation may have left vacant."—Med. Juris. Vol. 3. p. 7.—Reference is made by these writers to the case of Richard Coleman, who was tried at the Kingston Assizes, in March, 1749, for the violation and murder of Sarah Green, when he was capitally convicted and executed. In this case, Coleman was positively sworn to by Sarah Green, just before her death, as being one of the assailants. Two years after the execution of this person, it was discovered that James Welch, Thomas Jones, and John Nicholls, were the guilty persons. Nicholls was admitted King's evidence, and the other two were convicted and executed.—Vol. 3. p. 143, *note*.

[2] It is proper to observe, however, that some persons possess a peculiar faculty of recognising the human features. George the Third is said to have possessed this power in a very remarkable degree.

evidence of this kind, to ascertain the means and opportunities which the witness had of observing the person of whom he speaks. Thus, there is often doubt in regard to identity, where the crime was committed in a tumultuous meeting, at night, by persons disguised, and not recognised by any particular mark, especially if they were previously unknown to the witness. Sometimes the resemblance of one person to another creates a difficulty, as does change of dress, and the effect which long confinement often has on the appearance of the prisoner.[1] To these may be added, the effects of age, climate, diseases, and passions of the mind, and those changes which may be produced by art. In the English case of Joseph Redman, (1822,) for robbery on the King's highway, the person robbed stated, in his cross-examination, that he knew a man of the name of Greenwood, so much like the prisoner with his hat on, that he should hardly know one from the other. Greenwood was in custody, and appeared at the bar, when the similarity struck every body with astonishment. The prisoner Redman proved an *alibi*, and the jury returned a verdict of not guilty.[2] In the English case of Robert and Daniel Perreau, (twin brothers,) tried and executed for forgery, in 1775, Mr. Watson, a money-scrivener, who had drawn eight bonds by order of one or other of the brothers, hesitated to fix on either, in consequence of their great personal resemblance; upon being pressed, however, to make a positive declaration, he at length fixed upon Daniel.[3] An individual was tried before Judge Livingston, at New York, in 1804, for bigamy. He was charged as Thomas Hoag, but stated himself to be Joseph Parker. Several witnesses swore that they had known him under the name of Thomas Hoag, among whom was a female whom he had married, and afterwards deserted. It was stated that Hoag had a scar on his forehead, a small mark on his neck, and that his speech was quick and lisping. All these peculiarities were found in the prisoner. Two witnesses deponed, that Hoag had a scar on the sole of his foot; but, on examining his feet in Court, no scar was found. It was farther proved, that, at the period of his alleged courtship of the second wife in Westchester County, he was doing duty as a watchman in the city of New York. The jury acquitted him.[4]—Scars and marks on the person of the prisoner, often add great force to the proof of identity. In the case of David Little, tried at Glasgow, for stouthrief, (January, 1831,) one of the witnesses, a servant of the family attacked, stated, that,

[1] Burnett, 593.
[2] 3 Paris and Fonblanque, 143, *note*.
[3] Ibid.
[4] Beck's Med. Juris. 224.—Dunlop's Edit.

at the time the crime was committed, he had struck the prisoner a violent blow on the head with the handle of a rake, and that he had no doubt that the blow must have left a scar. On examination in Court, a scar was found on the prisoner's head, exactly in the situation described by the witness. Little was convicted.[1]—The degree of light under which the prisoner has been observed by the witness is often important. In the case of Balleny and M'Neill, (24th Jan. 1825,) for house-breaking, a witness swore to the identity of the pannels, from having observed them by the light of the lamps of a stage-coach in passing,—the witness having been on the top of the coach, and the horses going at their ordinary speed at the time.[2] In a case which occurred in France, in 1809, of a person shot in the night, it was stated, that the flash of the pistol enabled the witness to identify the features of the assassin. The possibility of the statement was referred to the physical class of the Institute, who reported against it. M. Foderé, who relates the circumstance, is inclined to believe, that if the persons be at a small distance, *and the night be dark*, such an event is by no means impossible.[3] In the English case of Haines, (1799,) for shooting at certain Bow-Street officers, one of the persons attacked deponed, that the assailants were two men on horseback; that the night was dark, but, *from the flash of the pistols*, he could distinctly see that one of the men rode a dark-brown horse, between thirteen and fourteen hands high, of a very remarkable shape, having a square head, and very thick shoulders, and altogether such that he could pick him out of fifty horses, and that he had since seen the horse. He also perceived, *by the same flash of light*, that the person had on a rough shag brown great-coat.[4]—In some cases, where there has been reason to presume that the witnesses would speak rashly, or unfairly, as to the identity of the prisoner, the Court have allowed him to be removed from the bar, and placed among the bystanders, previously to the witnesses being brought into Court. This practice, however, has been rarely resorted to, and is justly reprobated by Mr. Burnett, as a snare to the witnesses.[5]—Where evidence is given as to the identity of a *dead* person, it ought to be received with great caution, unless the witnesses found their knowledge upon some indelible marks in the dead body, as to which they cannot be mistaken; for it often happens, that, soon after death, a total change of the features takes place, so that it is impossible for the most intimate acquaintance to recognise the person. In the case of Blinkhorn, (7th June, 1824,) for the murder of

[1] Unreported. [2] Unreported. [3] Med. Leg. t. 1. p. 28.
[4] 3 Paris and Fonblanque, 143, *note*.
[5] Burnett, 594.

her daughter, the witnesses swore to the identity of the body, chiefly in consequence of a scar on the nose, though the corpse had lain for about three weeks under water.[1] A case occurred in England, in 1817, where, on an inquest, an old man declared a dead female to be his daughter. On investigation, however, the daughter was found alive, and was produced before the Coroner. The resemblance between the dead and living woman was very great.[2] Mr. Dunlop, in his edition of Dr. Beck's work, states the following case:—"A resurrection man was tried for raising the body of a young woman from the church-yard of Stirling. Nine weeks after death the body was discovered, and identified by all the relations, not only by the features, but by a mark which they believed could not be mistaken, she being lame of the left leg, which was shorter than the right. The jury were convinced that the libel was proven, and gave a verdict accordingly. Now, I am certain that this was not the body of the woman who was taken from the church-yard of Stirling, but one that, at least six weeks after the time libelled, was buried in the church-yard of Falkirk, from which she was taken by this man, who also took the other, for which he was tried. She also was lame of the left leg."[3] Where the body has been disfigured by wounds, or by the natural progress of decay, proof of identity is often impossible.[4]—The identification of *animals* may sometimes be necessary in criminal trials, as in cases of horse-stealing, sheep-stealing, and the like. Generally speaking, it is much more difficult to distinguish between animals than individuals of the human species, though it is said that shepherds, and others, accustomed to the continual view of animals, can discern as strong differences in their forms and features, as in those of the human species.[5] Sheep in general are distinguished by a mark on some particular part of the body, to which the witness can refer.

Another kind of fact, as to which witnesses are, generally speaking, liable to fall into mistake, is that of *oral statements*, and declarations made by another. It has been already seen, that the law only admits this sort of evidence in particular situations.[6] Casual expressions are always liable to be mistaken, and inaccurately remembered, and their meaning is

[1] Unreported. [2] Smith's Principles of For. Med. 500.

[3] Beck, 225, *note*.—This case was referred to in the trial of Glen for murder, (10th Nov. 1827,) when the Lord Justice-Clerk observed, that the circumstance was fresh in his recollection, and that, in consequence of the discovery alluded to by Mr. Dunlop, the man had a pardon.—Syme, 273.

[4] See below, "Evidence in Homicide."

[5] 1 Paris and Fonblanque, 221. [6] See before, p. 30.

liable to be misrepresented and exaggerated. Such words, besides, are often spoken without serious intention. Foster says, "Words are often misreported, whether through ignorance, inattention, or malice, it matters not to the defendant; he is equally affected in either case. And withal, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is, confronted."[1] Mr. Starkie observes, that "A hearer is apt to clothe the ideas of the speaker, as he understands them, in his own language, and by this translation the real meaning must often be lost. A witness, too, who is not entirely indifferent between the parties, will frequently, without being conscious that he does so, give too high a colouring to what has been said. I once heard a learned Judge, in summing up on a trial for forgery, inform the jury, that the prisoner, in a conversation which he had had with one of the witnesses, had said, 'I *am* the drawer, the acceptor, and the indorser of the bill.' Whilst the learned Judge was commenting on the force of these expressions, he was, at the instance of the prisoner, set right as to the statement of the witness, which was, that the prisoner had said, 'I *know* the drawer, the acceptor, and the indorser of the bill.' Had the witness, and not the Judge, made the mistake, the consequences might have been fatal. The prisoner was acquitted."[2]—In evidence of this kind, it is of peculiar importance to attend to the circumstances of the witness,—his interest and prejudices,[3]—and the likelihood of his having had his attention engaged by the language made use of. It sometimes happens, in cases of murder, that threatening and mysterious words are said to have been spoken by the prisoner previous to the murder, or immediately afterwards, which are founded on as circumstances against him. Such expressions, which are generally of the nature of hints or innuendos, are in great danger of being interpreted by the witness, rather

[1] Foster, 243.

[2] 1 Starkie, 462.—See also Burnett, 566.—In the English case of Giles, (1690,) for assaulting and attempting to murder Mr. Arnold, a magistrate who had been active against the Papists, it appeared that, subsequently to the assault, the prisoner employed a cutler to repair a sword for him. The cutler, on examining the sword, which was injured, said, "What, have you been fighting with the devil?" According to one witness, the prisoner answered, "No; *with damned Arnold.*" But another witness, who was also present on the occasion, swore that his answer was, "No; *for I never met with Arnold.*" The prisoner was convicted.—Howell's State Trials, Vol. 7. p. 1130.

[3] In the English case of Canning, (1753,) for perjury, committed on the trial of Mary Squires, evidence was brought as to an admission of guilt made by Squires while in prison. The facts of the case, however, shewed, that the witness had been mistaken, probably from preconceived opinions of the prisoner's guilt.—Howell's State Trials, Vol. 19. p. 283.

according to his subsequent views of the case, than according to his understanding of the language at the time. Reference may here be made to the English case of Spencer Cowper, (1699,) for the murder of Mrs. Sarah Stout. Three other gentlemen, Marson, Stephens, and Rogers, were tried along with Mr. Cowper for this crime. It appeared that Mr. Cowper was in company with the deceased, at her mother's house, on the night of her death, and that they went out about eleven o'clock, whether in company or not, could not be ascertained. Mr. Cowper did not return, though he had promised to stay at Mrs. Stout's that night; and next morning, the body of Sarah Stout was found floating in a river in the neighbourhood. The three other prisoners came to their lodgings in the same town, (Hertford) about eleven o'clock that night. One of them (Marson) appeared to be very hot. In the course of conversation, as deponed to by the landlord and two other witnesses, they put several questions to the landlord, regarding Sarah Stout. Marson said, "She has thrown me off, but a friend of mine will be even with her by this time." Rogers said, he was in with her, and afterwards said that her business was done. One said he would pass his word that Mrs. Sarah Stout's courting days were over. One of them asked if the business was done? And another answered he believed it was; but if it was not, it would be done to-night. They mentioned Mr. Cowper's name.—Next day Marson and Stephens were seen in company with Mr. Cowper.—This was the whole evidence affecting the prisoners. The case, therefore, rested materially (indeed, in regard to Marson, Stephens, and Rogers, almost wholly) upon the expressions they were said to have used. These prisoners admitted that they had spoken of the deceased, and produced evidence to shew the reason of it. It appeared that a friend of theirs, a Mr. Marshall, had paid his addresses to her, and that she had rejected him, and that, in jocular conversation, they were asked by some of their acquaintances, when they went to Hertford, to bring an account of their friend's mistress. It was this circumstance that induced them to speak of her to the landlord. Marson said it was possible he might have used the words, "My friend may be in with her," in reference to Marshall, but he did not remember saying any thing like it. They all denied having said any thing of her courting days being over.—The jury acquitted the prisoners. —It would appear, from the statements of the witnesses themselves, that it was not till they heard of the death of Stout that they began to think that the expressions which had been used intimated violence against her. It is probable, therefore,

that these witnesses, struck with the coincidence of three strangers having spoken of Stout in a way which they could not fully understand, on the very night when she had suffered a violent death, had been induced to believe that these expressions were such as connected the strangers with the supposed murder.[1]

Another circumstance, as to which witnesses are liable to fall into error, is the *time* when any act took place. This is a matter of importance in almost all trials, and especially in those where the prisoner rests his defence on the plea of *alibi*, for in such cases, it is only by accurately comparing the time of the facts, as stated by the opposing witnesses, that a satisfactory conclusion can be arrived at. The proof of time is important only as an accompaniment of some fact. There is, however, for the most part, no connexion between the fact and the time, that can impress the mind of a witness as to the latter circumstance. The *fact* takes place before his eyes, and must be observed by him, with more or less accuracy; the *time* is generally not apparent, and is disregarded by the witness, unless his attention is particularly called to it.—When a witness speaks pointedly as to time, it is always of importance to ascertain his cause of knowledge, or the reasons which induced him to observe and remember the circumstance. The prisoner's witnesses, in a case of *alibi*, often attempt to fix precisely the time when they saw the prisoner, either by having heard a clock strike, or by having examined their watches, though they are unable to explain why the hour made any impression on their minds.—Where any conversation has taken place as to the hour, it is always a material circumstance, as serving to explain the recollection of the witnesses. In an English case of highway-robbery, the robber, after committing the crime, rode to the distance of several miles in an incredibly short space of time, and appeared in a tavern, where he instantly inquired what o'clock it was, complaining of the inaccuracy of his watch, and alleging that it was not so late, by some minutes, as was said. His object was to fix accurately in the minds of the persons present the time of his appearance among them, in order that it might appear impossible that he had committed the robbery. His scheme, however, was defeated, as he had been seen riding with remarkable speed towards the tavern, as if from the place where the crime had been committed.—

[1] There was much doubt in this case, whether the death of the deceased had been occasioned by suicide, by the act of a murderer, or by mere accident. The case was tried in July, 1699.—Howell's State Trials, Vol. 13. p. 1166.

In the case of Smith and Brodie, (1788,) for housebreaking, the act was proved to have taken place about half past eight on a certain evening, and Brodie's presence on that occasion positively sworn to. Two women, of indifferent character, swore that Brodie was with them, in the same town, from eight till next morning. The jury convicted, partly on account of the low credit of the women, and partly because no sufficient reason was given for their noting the hour and night so accurately.[1]

Integrity of Witnesses.

It is necessary to take into view the *integrity* of the witness, as well as his ability. It has been already seen, that persons standing in particular situations, are excluded altogether from giving evidence, on the presumption of want of integrity; as, for instance, infamous persons, near relations, and the like. Those to whom the disqualifying rule does not apply, are, of course, admissible, though it sometimes happens that the integrity of such persons labours under strong suspicions, as, for instance, where they are of depraved character, though not legally infamous; or where they are connected with the prisoner by the ties of friendship or interest. Of the credit due to such witnesses, the jury, of course, must judge. A witness of depraved character may perhaps be relied on, where there is no inducement for misrepresentation; but it must be observed, that it is often difficult to detect the motives which may influence a corrupted mind. It will be for the jury to consider, in such a case, whether they will be satisfied with the *apparent* absence of a motive, or whether they will require some assurance of its *actual* absence.[2]—The conclusions of a jury, as to the integrity of a witness, may rest either on positive evidence as to his previous situation, conduct, and character; or on presumptions drawn from his connexion with the parties, or the subject-matter of the cause, and the various circumstances by which he may be biassed and influenced. His situation in society is also to be kept in view. Mr. Starkie remarks, that, though the obligation of an oath be equally strong in every condition of society, yet the consequences of detected perjury are much more serious to a person in a situation of public confidence, than to one in an inferior condition; and hence the inducement to prevaricate is greater in the latter case than in the former.[3]—Something of the

[1] 2 Hume, 412. [2] 1 Starkie, 455. [3] Id. 519.

character of the witness may be occasionally learned from his own statements. In the trial of Stewart, (1752,) for the murder of Campbell of Glenure, one of the witnesses stated, that, on a certain occasion, soon after the murder, several articles were brought to him which belonged to one of the persons suspected of the crime; that the witness refused to receive the articles, but told the person who brought them, to deposit them in a particular place, and go away, and then he (the witness) would take them. This he did, (as he said,) in order that *he might be able to swear safely that he had not got the articles from the man.*[1] It is plain that this person's ideas of an oath were such as to throw discredit on his whole testimony.—In judging of the integrity of a witness, his demeanour in giving his evidence is important. Sir William Blackstone observes, that "as much may be frequently collected from the *manner* in which the evidence is delivered, as the *matter* of it."[2] Hence arises one of the great advantages of *viva voce* examination, which not unfrequently supplies the only true light by which the characters of the witnesses can be appreciated. Forwardness on the part of the witness, in testifying that which will benefit the party for whom he is called, reluctance in giving adverse evidence, slowness in answering, evasive replies, affectation of not hearing or not understanding the question,[3] precipitancy in answering, without waiting to hear or understand the question, manifestations of zeal beyond what the occasion calls for, flippancy, and levity of manner, coldness and apathy in describing injuries which would naturally excite a contrary feeling, are all, to a greater or less extent, indications of insincerity.[4] A witness, however, sometimes expresses himself in a confused and hesitating manner, from mere awkwardness, or from superabundant caution. This kind of hesitation is very general when the witness is plied with questions of a hypothetical nature, and when the answer is not so much an act of testimony as of reasoning, such as, *If it had been so, must you not have recollected? &c.* Where proof is actually given of a fact which a witness could not but know and recollect, his expressing himself with doubt and uncertainty is, in general, to be regarded as an act of wilful misrepresentation.[5]—A dishonest witness generally avoids giving a min-

[1] Howell's State Trials, Vol. 19. p. 1. [2] 3 Blackst. Com. 373.

[3] Mr. Evans observes, that a Welsh witness, who intends to give unfair testimony, always affects an ignorance of the English language, in consequence of which, by the intervention of an interpreter, he has time to prepare his answer.—2 Pothier, 258.—Evans' Edit.

[4] 1 Starkie, 457 and 521.

[5] 2 Evans' Pothier, 258.—"There are some facts whose absolute or relative importance to the individual is so great, that, unless we suppose an

ute detail of circumstances, by which he diminishes the chance of contradiction. He often exhibits anxiety to reconcile apparent discrepancies, and to anticipate objections to his evidence,[1] and he generally pretends to remember the most minute circumstances with as much accuracy as those of interest and importance. A witness who prevaricates, in order to secure a particular object, will generally take care to make his evidence sufficient for the attainment of the end in view. He will not swear falsely, and, at the same time, in such a manner as to forego the advantage which he proposes to himself. He will speak precisely and distinctly to all the circumstances which are material to his object, and he will take care to exhibit no doubt or hesitation as to his recollection of the facts.[2] It thus frequently happens, that the glare and superfluity of a witness's testimony, when bearing on a particular point, carries with it a suspicion of its truth, while a contrary effect is produced, by evidence of a comparatively weaker kind.—In all cases, in judging of a witness's integrity, his reason *for* knowing the fact (his *causa scientiæ*, as it is called) is of material importance. In general, the *causa scientiæ* appears from the story itself, but where it does

almost total decay of his faculties, it is not credible that they should be effaced from his memory by any length of time. Ask a man, whether he once saw a murder perpetrated before his eyes, or whether his father, with whom he had lived twenty years, was blind or not? No interval of time can throw a shadow of doubt on facts like these. A fact also may be important through association. A spot of blood, observed in a certain place, may serve to indicate a murder; a knife of a particular appearance may indicate the person of the murderer. These circumstances become important to the witness, from being connected in his mind with the idea of an atrocious crime; taken separately, they would be nothing, they would be forgotten as soon as perceived."—Bentham's Judicial Evidence, p. 25.

[1] In reference to the peculiar style of the writers of the Gospels, Dr. Beattie observes, that "no remarks are thrown in to anticipate objections, nothing of that caution which never fails to distinguish the testimony of those who are conscious of imposture, no endeavour to reconcile the reader's mind to what may be extraordinary in the narrative." And Duchal, (as quoted by Paley,) in regard to the same subject, remarks, that "It doth not appear that ever it came into the mind of these writers to consider how this or the other action would appear to mankind, or what objections might be raised upon them. Without at all attending to this, they lay the facts before you, at no pains to think whether they would appear credible or not. If the reader will not believe their testimony, there is no help for it; they tell the truth, and attend to nothing else."—Paley's Evid. of Chris. Part 2. c. 3.

[2] "Whenever a paper is forged with a particular intention, the eagerness of the forger to establish the point in view, his solicitude to cut off all doubts and cavils, and to avoid any appearance of uncertainty, seldom fail of prompting him to use expressions the most explicit and full to his purpose. The passages foisted into ancient authors by heretics are examples of this. A forger is often apt to prove too much, but seldom falls into the error of proving too little."—Dr. Robertson's Dissertation on Darnley's Murder, p. 245.

not, the witness must be called on for a particular explanation.[1]

Number of Witnesses.

Another circumstance affecting the credibility of testimony is the *number of the witnesses.* Upon this point, it is necessary to attend to the distinction between *direct* and *circumstantial* evidence. Direct evidence occurs where the witnesses swear to the actual commission of the crime, as observed by themselves; circumstantial evidence, where they swear, not to the actual commission of the crime, but to certain facts which are supposed, with more or less probability, to be indications of it. In cases of direct evidence, two witnesses are necessary to constitute legal proof; and if, therefore, in such a case, only one witness is produced, the jury must acquit; his testimony, unsupported by any other evidence, being held incredible in the estimation of the law.[2] Accordingly, in the case of Anderson and others, (1725,) tried for deforcing the revenue officers, and carrying off some barrels of soap, the jury, as to certain of the pannels, having found it proven, "by *one* witness," that they were seen carrying off some of the barrels, these pannels were assoilzied.[3]—Where only two witnesses are produced, in a case of direct evidence, the proof is not sufficient, if one of these witnesses stand in a situation of doubtful credibility, as, for instance, an associate in the crime, or one who has been punished for an infamous offence, though not convicted by a jury. Upon this principle, a robber cannot be condemned on the testimony of his associate in the crime, and that of the person robbed.[4] Of course, the defects, and even the total want, of a second witness, may be supplied by circumstances, and in such a case as that of the robber just noticed, Baron Hume remarks, that a few slight circumstances ought to be sufficient.[5] A situation of this kind must, however, be judged of by the jury, and cannot be made the subject of any general rule.—In cases of circumstantial evidence, whether occurring pure and by itself, or in conjunction with direct evidence, two witnesses are not necessary to each circum-

[1] It has been remarked by Lord Hailes, that "It is difficult always to assign the causes which originally fixed a fact in the memory. There are many things which impress an idea upon the memory, and that idea will remain after the cause of its impression has been effaced."—Speech in the Douglas Cause, 1767.

[2] The maxim of the Civil law is, "Unius responsio testis omnino non audiatur."

[3] 2 Hume, 383.

[4] Ibid.

[5] Ibid.

stance, because the coherence of the several circumstances often as fully confirms the truth of the story, as if all the witnesses were deponing to the same facts. A circumstance, however, may happen to be of such capital importance, that an intelligent jury will not receive it on the testimony of one witness, at least, unless he is of the highest credit.[1] Of such a case, however, the jury can be the only judges.[2] In the case of Souter and Hog, (1738,) for attempt to suborn false evidence against a certain individual, each attempt, though made upon different persons, was held by the Court and the jury to be sufficiently proven by one witness.[3] This, however, would not be held where the acts of the same crime have no connexion with each other, as, for instance, the successive uttering of forged notes, at different places, to different persons.[4]—It is scarcely necessary to observe, that the force of evidence, in all cases, is increased by the increased number of the concurring witnesses; as it is more improbable that a number of witnesses should be mistaken, or that they should have conspired to commit a fraud by perjury, than that one or a few should be mistaken, or wilfully perjured.[5] It may be added, likewise, that the chance of detection, in the case of false evidence, is greatly increased by an increased number of witnesses, as the points on which the testimonies may be compared are thus greatly multiplied.

Consistency of Testimony.

Another important criterion of the credibility of testimony is its *consistency*. Where several witnesses concur in stating a series of particular circumstances, either their evidence is true, or it is the result of concert. If, therefore, concert is disproved, or rendered highly improbable, the evidence must be believed, even though the witnesses individually should not be entitled to much credit.—The absence of concert may

[1] Mr. Burnett mentions the following circumstances as of this kind:—The *corpus delicti* in housebreaking; possession of the stolen goods in theft; the previous quarrel in homicide; the procuring of the poisonous substance in murder by poison. He adds, however, that no general rule can be laid down with regard to such cases, because the other circumstances proved will necessarily affect the proof of a fundamental fact, and render it complete, though deponed to by only one witness.—Burnett, 516.

[2] 2 Hume, 334. [3] Maclaurin, 657. [4] 2 Hume, 335.

[5] The force of the united testimony of numbers, upon abstract mathematical principles, increases in a higher ratio than that of the mere number of such witnesses. Upon these principles, if definite degrees of probability could be assigned to the testimony of each witness, the resulting probability in favour of their united testimony would be obtained, not by the mere addition of the numbers expressing the several probabilities, but by a process of multiplication.—1 Starkie, 469.

sometimes appear from the evidence itself. Thus, where the testimonies coincide in numerous minute and unimportant particulars, which the witnesses could not have foreseen would become the subject of examination, the presumption is, that there is no collusion between them.[1] Witnesses may, no doubt, fabricate coincidences even on minute points, but they can only do so to a certain extent, and thus their evidence will not be consistent and uniform throughout. Partial variances, however, as to matters which might naturally have been overlooked, or inaccurately observed by the witnesses, will not in general discredit their testimony.[2] —In judging of variances, it is necessary to keep in view the character and situation of the witnesses, and the nature of the fact as to which the discrepancy takes place; the question always being, Whether, under the whole circumstances of the case, the discrepancy can be held to have arisen from the natural defects of human observation and memory? In this view, there is an important distinction between positive and negative testimony. It often happens, that discrepancies

[1] Dr. Paley, with reference to historical evidence, says, "The *undesignedness* of the agreements, (which is to be gathered from their latency, their minuteness, their obliquity, the suitableness of the circumstances in which they consist to the places in which those circumstances occur, and the circuitous references by which they are traced out,) demonstrates that they have not been produced by meditation, or by any fraudulent contrivance. But coincidences from which these causes are excluded, and which are too close and numerous to be accounted for by accidental concurrences of fiction, must necessarily have truth for their foundation."—Evid. of Chris. Part 2. c. 7.

[2] Dr. Paley observes, "I know not a more rash or unphilosophical conduct of the understanding, than to reject the substance of a story, by reason of some diversity in the circumstances with which it is related. The usual character of human testimony is, *substantial truth under circumstantial variety*. This is what the daily experience of Courts of Justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression on the minds of the judges. On the contrary, a close and minute agreement induces suspicion of confederacy and fraud. When written histories touch upon the same scenes of action, the comparison almost always affords ground for a like reflection. Numerous, and sometimes important, variations present themselves; not seldom, also, absolute and final contradictions; yet neither the one nor the other are deemed sufficient to shake the credibility of the main fact. The embassy of the Jews to deprecate the execution of Claudian's order to place his statue in their temple, Philo places in *harvest*, Josephus in *seed-time*; both cotemporary writers. No reader is led by their inconsistency to doubt whether such an embassy was sent, or whether such an order was given. Our own history supplies examples of the same kind; in the account of the Marquis of Argyle's death, in the reign of Charles the Second, we have a very remarkable contradiction.—Lord Clarendon relates that he was condemned to be *hanged*, which was performed *the same day*; on the contrary, Burnet, Woodrow, Heath, and Echard, concur in stating that he was *beheaded*, and that he was condemned upon the *Saturday*, and executed upon the *Monday*. Was any reader of English history ever sceptic enough to raise a doubt whether he was executed or not?"—Evid. of Chris. Part 3. c. 1.

between these two kinds of testimony can be attributed to inattention or want of memory on the part of the negative witness. Thus, for instance, if two persons should remain in the same room for the same period of time, and one of them should swear that, during that time, he heard a clock in the room strike the hour, and the other should swear that *he did not hear the clock strike*, it is very possible that the fact might be true, and yet each might swear truly.[1] The conclusion, however, would be different, if, in the particular circumstances, the negative testimony could not be attributed to mistake; as, for instance, if the two persons were placed in the room for the express purpose of ascertaining whether the clock would strike or not.—Discrepancies in evidence most frequently occur where the prisoner founds his defence on the plea of *Alibi*, which is, in substance, an allegation that he was at a different place at the time when the crime was committed. That defence, accordingly, proceeds on the assumption that the prosecutor's evidence is false,[2] and the testimonies of the opposing witnesses are generally, therefore, of the most discordant kind. It rarely happens, however, that a concerted *alibi* is not detected by the contradictions which occur among the witnesses who support it.[3]

Probability of Testimony.

The credit due to testimony depends also in some degree on its *probability*, or conformity with human knowledge and experience.—In ordinary cases, if a witness were to state that which is inconsistent with the known course of nature, he would probably be disbelieved, for it might be more probable, in the particular instance, that the evidence was untrue,

1 1 Starkie, 517.

2 This is always the assumption where the evidence for the prosecution is *direct*. Where the evidence is *circumstantial*, the assumption is not necessarily that the witnesses have spoken falsely; it may simply be, that the inference deduced from their testimonies is erroneous.

3 In the case of Divan, (1824,) for the murder of his wife, two witnesses swore pointedly to an *alibi*. They stated, that, at the time of the murder, the pannel was playing at cards with them in a public-house at some distance from the place of the murder. One of them said, that they played *the first game for whisky, the second for ale, and the third for porter*;—the other stated, that they played *the whole games for whisky*; and they both asserted that *they had perfect recollection of the fact*. There was direct evidence of the prisoner's guilt.—Unreported.—In the case of Hamilton and others, (19th July, 1826,) for the murder and robbery of a soldier in a field near Glasgow, it was stated by a witness for the *alibi*, that, at the time of the murder, he heard one of the pannels, whom he pointed out, *singing in his own house*, the witness being in an adjoining house at the time. Two other witnesses for the *alibi* swore that they were with that pannel in his house during the same time, but that there was *no singing, either by the pannel, or any other person*.—Unreported.

than that such an anomaly had occurred. Instances of this may be found in the evidence given in some cases as to the appearance of the spirits of the dead, and the bleeding of the murdered person on the touch of the murderer.[1] Mere improbability, however, is by no means a certain test for trying the credibility of testimony, without regard to the character and situation of the witnesses; for events, antecedently considered improbable, sometimes occur, and their improbability usually arises from want of more correct knowledge of the causes which produce them.[2] Our conclusion, then, in matters of this kind, must depend upon a consideration of the nature of the fact on the one hand, and the credibility of the testimony on the other.[3]—In cases of murder, where the prisoner is connected with the deceased by ties of interest or relationship, the plea of improbability is often resorted to. In the case of Stewart, (1752,) for the murder of Campbell of Glenure, the guilt of the prisoner, it was contended, was rendered highly improbable by the fact of his holding a situation of profit under Glenure, of which he fell to be deprived by the death of that person. The jury, however, upon the evidence, found him guilty. In the case of Divan, (1824,) for the murder of his wife, the improbability rested on the fact, that the deceased and the prisoner had lived together for many years, so far as appeared, in harmony, and that she had borne him children, and was a well-behaved and industrious woman. The evidence, however, clearly proved his guilt, and the jury convicted accordingly. The improbability arising from the prisoner's previous conduct and character is also frequently founded on. Thus, in the case of

[1] Mr. Burnett says, that circumstances of this kind "would probably not now be admitted to proof," (p. 529) their improbability being so great, that the jury could have no alternative but to reject them.—See Bentham's Rationale of Judicial Evidence, Vol. 3 p. 258.

[2] This is apparent from the well-known instance stated by Locke. The Dutch ambassador told the king of Siam, that in his country the water was so hard in cold weather, that it would bear an elephant, if he were there. The king replied, Hitherto I have believed the strange things you have told me, because I looked upon you as a sober fair man, but now I am sure you lie.—Vol. 2. p. 276.

[3] It must be "a decision between the abstract improbability of the fact related, and the particular improbability of the immediate relation, under all its circumstances, being false."—Evans' Pothier, 2. 254.—Mr. Evans observes, "I have witnessed several cases which called for the practical application of this distinction. The one which at present occurs to me is an action against a man for sowing the field of another with dock seeds, a fact which was positively sworn to by a casual observer, and confirmed, among other circumstances, by the growth of the docks in the course which he had taken. It was contended to be highly improbable that any man should be guilty of such malignant conduct; but it was answered, that it was much more improbable that the witness, who had no connexion with the one party, or animosity against the other, should gratuitously involve himself in perjury in attesting the fact which was so corroborated."

Stewart just noticed, it was pleaded to the jury, as a gross improbability, that a person in the situation of the prisoner, holding the rank of a gentleman, and of irreproachable character, should at once have become an assassin.[1]

Effect of Falsehood.

Where there are grounds for holding that a fact stated by a witness is untrue, it must, of course, be thrown altogether out of view by the jury.—Where it appears that the untrue statement has been made from *error*, the other evidence of the witness will remain unimpeached, except in so far as the error may affect his character for ability. Where, again, the untrue statement has been made from *design*, the evidence of the witness must be thrown aside altogether, on the principle that a witness who gives false testimony as to one particular, cannot be credited as to any.[2] This rule, however, does not apply to the evidence he gives *against* the party in whose favour he has falsified. Where it is doubtful whether the untrue statement arose from error or design, the presumption of law, in favour of innocence, will assign it to the former, rather than to the latter origin.

SECTION II.

TENDENCY, OR IMPORT OF EVIDENCE.

THE last matter to be considered in judging of the sufficiency of evidence, is its *tendency or import*.—In cases of *direct* evidence, the import of the proof can never be attended with any difficulty; because, in such cases, the witnesses

[1] The English case of Squires and Wells, (1753,) for the robbery of Elizabeth Canning, furnishes an example of very improbable evidence. Canning stated, that she was attacked by several persons on the public road, and dragged to the house of Squires, where part of her clothes were taken off, and she was shut up in a room, where she remained for about *four weeks*, and that her only means of subsistence during that time was a pitcher of water and a quartern loaf; that she saw none of the people of the house during that period, and that she at last effected her escape by leaping out at a window, which was near the ground, and that she had never made any previous attempt to escape. Upon this evidence, which was partly confirmed by a woman of bad fame, who lived in the house, the jury convicted the prisoners, and Squires was condemned to death. Fortunately, however, before the sentence was carried into execution, some circumstances occurred tending to throw suspicion on the veracity of Canning; the prisoner was accordingly respited, and eventually Canning was brought to trial for perjury, found guilty, and sentenced to transportation. —Howell's State Trials.

[2] The maxim of law is, *Falsum in uno, falsum in omnibus.*

speak directly and immediately to the fact at issue, as observed by themselves,—so that, supposing the credibility of their testimony to be established, the inference of the prisoner's guilt necessarily follows. In cases of *circumstantial* evidence, again, this matter may often be the subject of considerable doubt, as the witnesses, in these cases, do not speak directly to the fact at issue, but to certain other facts which are supposed to be indications of it.[1] The subject of the present section will therefore fall to be considered in reference chiefly to circumstantial evidence.

The force of circumstantial evidence depends upon the usual or necessary connexion between facts and circumstances, the knowledge of which connexion results from experience and reflection. Where it is known that a number of circumstances are necessarily or usually connected with the fact in dispute, and such circumstances are proved to exist, a presumption that the fact is true arises, which is stronger or weaker, as observation and reflection shew that its connexion with the ascertained circumstances is constant, or is more or less frequent.[2]—In every criminal trial, the fact in dispute is, of course, the prisoner's guilt of the particular crime charged, and the force of the evidence, therefore, depends on the coincidence between that fact and the circumstances proved. Thus, for instance, a person is found murdered; another individual is proved to have recently before been quarrelling with him; is immediately thereafter seen running from the place, and is, almost without any interval, laid hold of with a bloody instrument in his hand, which he endeavours to conceal; and, when apprehended, he gives false and contradictory answers; these circumstances closely coincide with the fact that the person apprehended committed the murder, and cannot rationally be accounted for on any other hypothesis.—The probability of the prisoner's guilt must always be proportioned to the nature, extent, and number of its coincidences with the circumstances prov-

[1] See before, p. 46.

[2] Argumentum est necessarium cujus consequentia est necessaria, veluti *coivisse eam quæ peperit*; contingens, cujus consequentia est probabilis, veluti *eadem fecisse qui cruentatus est*. Contingentia argumenta, quamvis singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt. Hæc appellantur præsumptiones: præsumptio enim nihil aliud est quam argumentum verisimile, communi sensu perceptum, ex eo quod plerumque fit, aut fieri intelligitur.—Matth. de Crim. tit. 15, cap. 6. —"When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances which necessarily or usually attend such facts, and which are called presumptions, and not proofs, for they stand instead of the proofs of the fact, till the contrary be proved."—Gilbert on Evidence.

ed; and where these coincidences are such as to render the truth of any other hypothesis exceedingly remote and improbable, the proof is sufficient.[1]—Sometimes the coincidences, though few in number, are of such a nature as to exclude any but one hypothesis; as in the ordinary case of theft, where the prisoner is found in possession of the goods, recently after the crime, and gives no account to explain that possession; for though, in such a case, there are only two circumstances, namely, the *possession* of the goods, and the *omission to account for* it, the evidence cannot be regarded as otherwise than perfectly conclusive. Of the same nature is the case supposed by Lord Coke, where a man is found dead in a house, having been stabbed with a sword, and another is seen coming out of the house with a bloody sword in his hand, no other person having been in the house.—It often happens that the circumstances are minute and unimportant, when taken separately, and yet furnish conclusive evidence by their number and combination. Of course, in all cases, it is only by considering the circumstances in combination, and *as a whole*, that the force of the evidence can be judged of.—Where the circumstances are independent of each other, the probability of the disputed fact is in general increased in proportion to their number.[2] This is not the case where the circumstances are *dependent* on each other; that is, where failure in the proof of one would destroy the inference altogether.[3] It is likewise obvious, that the number of circumstances stated by any one witness, does not add to the probability of the fact in dispute, unless they are such as admit of contradiction, if his testimony be false.—The force of evidence resulting from the concurrence of circumstances, depends not merely upon the degree of improbability that those coincidences were merely casual and fortuitous, but frequently also upon that improbability, compounded with the further improbability, that another hypothesis is true which is not supported by any circumstances.[4]

[1] 1 Starkie, 488.

[2] On the principles of mathematical reasoning, the probability derived from the concurrence of a number of independent probabilities, increases not in a merely cumulative, but in a compounded and multiplied proportion.—1 Starkie, 497.

[3] Beccaria, c. 14.—The case of Bailey and M'Neill, (24th January, 1825,) for theft by housebreaking, furnishes an instance of *dependent* facts. An iron crow-bar was *found in the house broken into*, and appeared to have been used in forcing open the window. This crow-bar belonged to a coal-pit in the neighbourhood, about which *the prisoners had been loitering during the previous day*. The circumstance, therefore, of finding the crow-bar in the house, depended for its force on the previous circumstance of the prisoners having had an opportunity of taking it from the coal-pit.—Unreported.

[4] 1 Starkie, 494.

The coincidences between the facts proved, and the hypothesis, or fact in dispute, are either of a *moral*, or of a *mechanical* nature. Moral coincidences are those which derive their force from a knowledge and experience of man as a rational and moral agent;—all other coincidences are mechanical.

The connexion between the prisoner's conduct, and his motives, intentions, and consciousness, constitute *moral coincidences*.—The existence of motive to commit the crime, though a weak and inconclusive circumstance in itself, is fit to be considered in conjunction with other circumstances.[1] Of course, the absence of any apparent motive, or the existence of contrary motives, will operate in favour of the accused.[2] In cases which involve a conflict of motives, such as infanticide, where feelings of natural affection, on the one hand, are opposed to a desire of avoiding shame and detection on the other, the former are entitled to the highest consideration.[3]—The connexion between the prisoner's conduct, and his knowledge and consciousness, is of great importance.[4] The preparation of means and opportunities to commit the crime, and the attempts to avoid suspicion, and divert the course of inquiry, are of this nature. In the case of Donnellan, (1781,) for poisoning his brother-in-law with distilled laurel-water, it was proved that the prisoner practised distillation, and had a still in his own room, which he kept locked up. It was also proved that he induced the deceased, who was under medical treatment at the time, to place his phials of medicine in such a situation that the prisoner might have access to them;—it was by substituting the laurel-water for the medicine, in one of these phials, that the act was com-

[1] In the case of Wilson, (1803,) for the murder of his wife, the motive was, that of forming a connexion with another woman. In the case of Richardson, (1787,) for the murder of a female who was pregnant by him, his motive was to conceal the connexion.—Burnett, 524. In the English case of Mary Blandy, (1753,) for the murder of her father, the motive was to facilitate her union with a person to whom she was attached, and who had been rejected by her father. In the case of Donnellan, (1781,) for the murder of his brother-in-law, the motive was the prospect of succession to the deceased's property; and in the case of Patch, (1806,) for the murder of Mr. Blight, the motive was to possess himself of the business of the deceased.

[2] See before, p. 50.

[3] 1 Starkie, 492.

[4] "In circumstantial evidence, no part of the proof is so much to be regarded—no part of it can give so much conviction to the mind—as what arises from the conduct and behaviour of the party accused. Artifice or chance may collect a chain of circumstances together in such a manner as to create an appearance, and sometimes a conviction of guilt, against an innocent person. But I believe scarce an instance can be given where the principal part of the evidence from which the guilt is inferred, arises from the conduct and behaviour of an innocent person."—Speech of Lord Justice-Clerk Miller, in the Douglas Cause, 1767.

mitted. In the case of Divan, (1824,) for murdering his wife, by cutting her throat with a razor, it appeared that he had sent the deceased to a neighbour's house to borrow a razor, on the morning of the murder. His object seemed to be, to give rise to the idea that his wife had committed suicide, and had obtained the razor for that purpose. In his declaration, accordingly, he stated that she had been for some time in a depressed state of mind, and that, when the body was discovered, there was a cry from the crowd that his wife had cut her throat; but in this he was directly contradicted by the evidence. In the English case of Richard Patch, (1806,) for the murder of Mr. Blight, by shooting him with a pistol, it appeared that the prisoner and the deceased lived together, and that, a few days before the murder, and while the deceased was from home, the prisoner fired a pistol through the window into the room in which the deceased usually sat. He then went and alarmed the neighbours, and pretended to search about the premises for the person who had fired the pistol. The prisoner's object seemed to be, to create a belief that mischief was intended against Mr. Blight, by some unknown person, and thus diminish the risk of suspicion attaching to himself, when the fatal deed should actually be committed.[1] In the case of Henderson, (1830,) for the murder of an old man, to whom he was apprentice, and who lived in a lonely cottage, it appeared that, about the time of the murder, the prisoner ordered a girl who brought milk to the deceased in the morning, not to bring it any longer for some time, as *his master was going from home.*[2] In the late case of M'Leod, (Inverness, 27th September, 1831,) for the murder of a pedlar of the name of Grant, by striking him on the head with a hatchet, and afterwards throwing him into a loch, the prisoner stated to one of the witnesses, after the body was discovered, that the death had been accidental, or occasioned by suicide, and that there were some *scratches* on the body, which might have been caused by its being tossed about in the water, and knocked against rocks. The prisoner was not in any respect called upon to make this statement, or to give any explanation of the circumstances.[3] The case of Allan, (27th December, 1825,) for the murder of M'Kay, affords an instance of a more indirect attempt to divert the course of inquiry. In that case, the murder had been committed near a wood, in the parish of Fyvie, Aberdeenshire. On the following day, the prisoner, in the course of conversation with one of his neighbours, who had not heard

[1] Trial of Patch.—Lond. 1806.
[2] Alison, 78.
[3] Unreported.

of the murder, remarked, abruptly, that "there were a hantle of ill folks about the woods of Fyvie." Nothing had been previously said to lead to this observation.[1]—The manifestation of fear, on the part of the accused, is often remarkable. In the case of Richardson, (1787,) it was proved, that when his shoes were examined, in order to be compared with certain foot-prints at the place of the murder, he became agitated, and trembled greatly.[2] In the case of Emond, (1830,) it appeared that the prisoner refused to touch the body of the murdered person, probably on account of the vulgar superstition as to the bleeding of the corpse.[3] The fears of the guilty person are often disclosed, by his attempts to conceal himself, or to abscond, or to conceal or destroy the instruments of his guilt. In the case of Elphinstone, (1824,) for murder, the knife with which the act was committed was found concealed in the canvas, or ticking, of his bed.[4] In cases of forgery, the accused has sometimes attempted to swallow the forged note.—Where *false* accounts are given by the prisoner, as to concealed weapons, or marks

[1] Unreported.—Mr. Starkie, in his Treatise on Evidence, says, "I have remarked, that persons of the lowest classes of society, before the commission of premeditated murders, not unfrequently throw out some dark and mysterious hints as to the death of the intended victim. This is a circumstance, which, I apprehend, is to be attributed principally to an expectation, that, by this means, less of surprise, and of inquiry, will take place when the crime has been accomplished."—Vol. 1. p. 493.—In the case of Mary Blandy, for the murder of her father, it appeared that, some time before the murder, the prisoner had told her father's servants that she had heard unusual noises and music in the house, and that the music presaged her father's death, and that he would die within a twelvemonth.—Howell's State Trials, Vol. 18. p. 1118.—The restless anxiety of a mind, conscious of guilt, very often prompts the party to take measures for his security, which eventually supply the strongest evidence against him.—This disturbed state of mind is not unfrequently revealed by the prisoner's strange and unguarded conduct and expressions. Thus, it has sometimes happened, that the guilty person has himself announced the commission of the murder, when it was clear that no other person could be aware of it.—In the case of M'Leod, (1824,) for the murder of a woman on a moor called the Firmonth, in Aberdeenshire, the prisoner entered a house, shortly after the murder, in an agitated state, and with his trowsers dropping blood on the floor.—In the case of Glen, (1827,) for the murder of his illegitimate child, it appeared, that when he was apprehended, and before anything was said of the charge against him, he exclaimed that it was not he who drowned the child.—Syme, 264.—In the case of Patch, for the murder of Mr. Blight, he said to some of his friends, in reference to his examination before the coroner, "I was as near being hung as ever any thing was in this world; *and if I had, I should have been as happy as I am now.*" This was before he was charged with the murder, or taken into custody.—In the case of Corder, (1828,) for the murder of Maria Martin, whose body he had buried in a barn near his residence, when questioned, after the murder, by one of his friends, as to the deceased, he said that she would never have any more children; and he added, "She is where I can go to her at any day or hour I please; and when I am away, I am sure nobody else is with her."—Trial of Corder, p. 146.

[2] Burnett, 524. [3] Unreported. [4] Unreported.

of blood, the presumption of guilt is obvious. The same thing is true, where the prisoner fails to give *any* account as to such matters; as, in a case of theft, where he is found in possession of the stolen goods, concealed in his house, or about his person, and gives no satisfactory explanation of the way in which he obtained it.—Falsehood, in general, on the part of the prisoner, is to be considered as an indication of guilt; but this principle must be applied with considerable caution; for experience shews that a weak, but innocent man, will sometimes, when appearances are against him, have recourse to falsehood, in order to manifest his innocence, and insure his safety. A strong illustration of this is afforded, by the well-known case mentioned by Lord Hale. The niece of a certain person had been heard to cry out, "Good uncle, do not kill me!" and soon afterwards disappeared; and he being suspected of having destroyed her, for the sake of her property, was required to produce her before the Justices of Assize. He being unable to do this, (for she had absconded,) but hoping to avert suspicion, procured another girl, resembling his niece, and attempted to pass her off as such. The fraud was, however, detected; and, together with other circumstances, appeared so strongly to indicate the guilt of the uncle, that he was convicted, and executed for the supposed murder of the niece, who, as it afterwards turned out, was still living.[1]

Mechanical Coincidences consist, generally, in proximity in point of time and space, and all other circumstances, which shew that the prisoner had the means and opportunity of committing the crime. They embrace, likewise, all circumstances which connect the prisoner with the crime, by visible traces on his person, or otherwise. Coincidences of this kind, it is obvious, must be infinitely various, according to the nature of the case; their great utility in the detection of guilt has been often experienced. As common instances, the possession of stolen goods, in cases of theft, and stains of blood, or marks of violence on the person, in cases of homicide, may be mentioned.—Sometimes unexpected, and apparently trivial circumstances of this kind, have led to the detection of offenders, and furnished the most forcible evidence of guilt.

[1] In the case of Blinkhorn, (1824,) for the murder of her daughter, by beating her, and throwing her into the river Cart, the prisoner denied that the corpse found was the body of her daughter, and she gave a description of the girl, which was completely disproved by the evidence. She said, also, that the child had gone to see her father, who lived in Glasgow; but she made no offer to produce the child, or to shew that she was alive.—The evidence was very strong; but the jury found a verdict of Not proven.—Unreported.

In a recent case of breaking into a barn, and stealing corn, the guilty person was suspected, in consequence of a slight trace of corn being observed along the ground, from the barn, to within a short distance of his cottage.[1] In the English case of Morgan and others, (1770,) for the murder of Mr. Powell in Caermarthenshire, footsteps were traced from Powell's house (a deep snow having fallen) to that of Morgan, who was, in consequence, apprehended, and convicted. It often happens, that footsteps are proved to correspond with the shoes of the prisoner. In the case of Richardson, the correspondence appeared in the form of the sole, as apparently new mended, and the number and position of the knobs. In the English case of Thornton, (1817,) for the violation and murder of Mary Ashford, a particular kind of nail in Thornton's shoes, called a sparrow-bill, was distinctly marked in the impression on the ground. In the case of Emond, (1830,) for the murder of two females, in their own house in Haddingtonshire, the mark of his shoe was found imprinted on the boards of the floor in blood; the impression agreed with Emond's shoe, which had a peculiarly formed iron heel. In an English case of murder, it was proved, that a patch on one knee of the prisoner's breeches corresponded with impressions made upon the soil close to the place where the murdered body lay. In a case of robbery, also tried in England, it appeared, that the person attacked had, in his own defence, struck the robber upon the face with a key, and the prisoner bore an impression upon his face, which corresponded with the wards of the key.[2] In a recent case of housebreaking, the thieves had entered by a window, after breaking the glass, the fragments of which were found stained with blood. Suspicion attached to the prisoners, from their being seen next day with their hands cut and bandaged.[3] In the case of Wales, (1828,) for theft by housebreaking, a shoe was left in the house by the thief, he having made a hasty retreat on being scared. The prisoner was apprehended in bed; but, on examining his stockings, it was found that the sole of one of them was covered with mire, while that of the other was clean. The morning of the theft was wet and dirty, and the street between the prisoner's house, and the house broken into, was covered with mire. The prisoner was convicted.[4] In the English case of Ludman, for murder, the deceased was found hanging with a handkerchief over his face, and his

1 Inverary, September, 1831.—Unreported.
2 1 Starkie, 486.
3 Glasgow, 1830-1.—Unreported.
4 Unreported.

hands tied behind his back, in such a manner as to shew that he had not suspended himself. On examining the rope round his neck, it was found to have been fastened by what is termed a *sailor's knot*, in consequence of which circumstance, suspicion fell upon Ludman, who was, by profession, a sailor, and he was ultimately convicted of the murder.[1] In the case of Richardson, (1787,) it was proved, that the prisoner was left-handed, and likewise, that the person by whom the throat of the deceased had been cut, must have held the instrument in his left hand.[2] In the case of Patch, who was also left-handed, it was clearly shewn, by the relative position of the deceased, and the door from which he was shot, that the murderer must have exposed his person to the view of the deceased, unless he fired with the left hand.[3] In another case of murder, by shooting with a pistol, the wadding of the pistol was discovered to be part of a torn letter belonging to the prisoner, the remainder of which was found in his possession.[4] In the case of Hamilton and others, (19th July, 1826,) for the murder of a soldier in a field near Glasgow, by shooting him with a pistol, it was proved, that the pannels, on the day of the murder, had been seen gathering pebbles, or small pieces of stone, from the ground, part of which they were observed to put into a pistol. On the body of the deceased being dissected, substances of this kind were found lodged in the wound.[5]

Mechanical coincidences are rarely sufficient, of themselves, to constitute a conclusive proof, without the aid of circumstances of a moral nature. Let it be supposed, for instance, that a person has his pocket picked of his purse, and that the contents of it were one penny, two sixpences, three shillings, four half-crowns, five crowns, six half-sovereigns, and seven sovereigns, and that a person, apprehended in the same fair or market where the theft takes place, is found in possession of the same remarkable combination of coin, and of no other; but that no part of the coin can be identified,

[1] 3 Paris and Fonblanque, 44. [2] Burnett, 524.
[3] 3 Paris and Fonblanque, 34.
[4] Case cited by the Lord Chancellor, in a debate in the House of Lords, in November, 1820.—In an English case of murder, the prisoner, when apprehended, had a bludgeon in his hand, from which a splinter had been lately broken. In the head of the deceased was found a chip, or splinter, which exactly fitted the cavity in the bludgeon.—Treatise on Circumstantial Evidence in reference to Donnellan's Trial.—In a case of theft, which also occurred in England, the thief had gained admittance to the house by opening a window by means of a penknife, which was broken in the attempt, and part was left in the wooden frame. The broken knife was found in the pocket of the prisoner, and perfectly corresponded with the fragment left.—1 Starkie, 485.
[5] Unreported.

and no other circumstance operates against the prisoner. Here, notwithstanding the extraordinary mechanical coincidence of the coin, the proof of guilt would be insufficient. But suppose that circumstances of a moral nature were added, such as flight, concealment of the money, or false statements in regard to it, the proof of the crime might be considered as complete.[1] In this way, it happens that mechanical coincidences, though imperfect in themselves, frequently give rise to circumstances of a moral kind, which render the proof conclusive. Thus, blood on the murderer's clothes is a mechanical fact; but a moral circumstance is superadded, when he denies that it is blood, or gives any other false statement respecting it. In the case of Dandie, (1810,) for murder, it appeared that some traces of blood, on the prisoner's dress, had been made the subject of jocular conversation between him and a girl who had been sent for by the prisoner's family to help to wash clothes. This circumstance, which would have been favourable to the prisoner, assumed a different aspect, by his denying, in his declaration, that any such conversation had taken place.[2] In the case of Abercromby, (1718,) for the murder of Hay, it appeared that the prisoner was drinking one night, with some friends, in a tavern, when he was called out to the street by the deceased, and went with him, *leaving his hat in the room.* About the same time, some persons in the street saw a man, *without a hat*, stab the deceased, who immediately expired. The prisoner *did not return to his company, but borrowed a hat at another tavern, and went home, and to bed*, where he was that night apprehended. The circumstance of the prisoner's being without his hat was a mechanical coincidence merely, and might not have been deemed conclusive; but his conduct afterwards, in avoiding his friends, and borrowing a hat, furnished a moral coincidence, which seemed inexplicable, except on the supposition of his guilt. He was, accordingly, convicted.[3]—The case of Mr. Bernard, (1758,) who was tried in England, on a charge of sending a threatening letter to the Duke of Marlborough, furnishes a singular example of bare mechanical coincidence. The Duke was twice required, by letter, to meet the writer at certain public places, and, on both occasions, was met by the prisoner. That these meetings should have happened by accident, was certainly most remarkable; yet, notwithstanding the suspicion created by such coincidences, they were clearly insufficient to

[1] 1 Starkie, 499.
[2] Buchanan's Cases, Part 2. 106.
[3] Quoted in Trial of Stewart.—19 Howell's State Trials, 1—262.

warrant conviction. The prisoner was accordingly acquitted.[1]—A few cases may be figured, however, in which mere mechanical coincidence will furnish sufficient evidence, as, for instance, where it is proved that a person entered a room containing a watch—that the watch was gone upon his departure, and that no other person, in the interval, had had access to the room.[2] The same is true, in the ordinary case, where cloth is cut and stolen from a loom, the cloth being discovered in the prisoner's possession, and found to correspond with the remnant left behind. The probability of identity in such a case, arising from the perfect coincidence of the severed threads, exceeds the bounds of calculation, and deprives the mind of all power of attributing such a series of coincidences to mere accident.[3]—It rarely happens, in practice, that circumstantial proofs consist purely in mechanical coincidence, unconnected with any of a moral nature. Thus, the silence of the guilty person, when examined, or his false or contradictory statements, constitute moral circumstances against him, the tendency of which is more or less conclusive. In a case of theft, for instance, where the recent possession of the goods is proved against the prisoner, if he refuse to give any explanation of the fact, or if he give a false explanation of it, the evidence assumes a moral and conclusive nature.[4]

[1] State Trials, A. D. 1758.

[2] The English case of Jeffries and Swan may be noticed here, as somewhat similar to that mentioned in the text. They were tried for the murder of Mr. Jeffries in his house at Walthamstow, in 1751. It appeared that the prisoners lived with the deceased, and that, on the morning of the murder, the dew on the grass surrounding the house had not been disturbed by footsteps, which must have happened had any person come to, or left, the premises. It followed, therefore, that the murder must have been committed by some one within the house, and no person was there but the deceased and the prisoners. They were convicted.—Trial of Jeffries and Swan, Lond. 1752.

[3] 1 Starkie, 500.

[4] The distinction between evidence of a *conclusive* nature, and that which is *inconclusive*, seems to be this; the latter is limited and concluded by some degree or other of finite probability, beyond which it cannot go; the former, though not demonstrative, is attended with a degree of probability of an indefinite and unlimited nature.—1 Starkie, 509.—Whenever the probability is of a definite and limited nature, whether in the proportion of one hundred to one, or one thousand to one, is immaterial, the proof is not sufficient. To hold the contrary, would be to decide that, out of some finite number of persons accused, an innocent man should be sacrificed for the sake of punishing the rest.—In all cases, where the evidence leaves it indifferent, which of several hypotheses is true, or merely establishes some *finite* probability in favour of one hypothesis rather than another, the proof is not sufficient. Thus, in practice, where it is certain that one of two individuals committed the act, but uncertain which, neither can be convicted. The case of Lindsay and Brock, (1717,) for the murder of Anderson, was of this kind. A sudden quarrel ensued between these persons, in the course of which they all came to the ground. When the deceased rose, it was found that he had a deep cut on his neck, of which he shortly afterwards died. It was certain that the wound had been in-

The effect of conclusive evidence is to exclude, to a moral certainty, all hypotheses but the one proposed to be proved; and among the hypotheses so excluded, are of course comprehended those which relate to *the crime itself, as disconnected with the prisoner*, or, as it is termed, the *corpus delicti*, as, for instance, in a case of murder, the hypothesis that the deceased died by natural causes, or by his own hand. The proof of this branch of the case must always be complete, before any weight can be attached to the circumstances tending to connect the prisoner with the crime; for, so long as any doubt exists as to the *act*, there can be no certainty as to the *criminal agent*.[1]—It is, in all cases, highly important to consider attentively the hypotheses supposed to be excluded, whatever their nature may be, in order to ascertain, whether the circumstances may not be capable of a reasonable explanation, consistently with the innocence of the prisoner. Even those hypotheses which only partially agree with the circumstances are not unworthy of examination; because it may happen, that, on a more minute scrutiny of the incongruous facts, their truth may be disproved, or at least rendered doubtful. In this view, the statement of the accused is of great importance; so far as he is concerned, he can always afford a clue to the conflicting circumstances. By examining his statement, a view may be suggested consistent with his innocence; or the question may be narrowed to the consideration, whether his statement be falsified by the evidence. In a case of possession of stolen goods, where no act of concealment or assumption of property can be proved, and the accused is consistent in denying all knowledge of possession, his defence is entitled to the most serious attention; it is otherwise, as has been seen, where he attempts to account for the possession by a false statement.[2]

flicted by one or other of the pannels, but uncertain by which. The result was, that neither of them were convicted of the murder.—1 Hume, 273.

[1] See below, "Evidence in Homicide."

[2] 1 Starkie, 512.—The following case is related by Mr. Starkie, as shewing the necessity of negativing, satisfactorily, all hypotheses but that of the prisoner's guilt, in a case of purely circumstantial evidence. "A servant girl was charged with having murdered her mistress. The circumstantial evidence was very strong; no persons were in the house but the murdered mistress and the prisoner, the doors and windows were closed and secured, as usual; upon this, and some other circumstances, the prisoner was convicted, principally upon the presumption, from the state of the doors and windows, that no one could have had access to the house but herself, and she was, accordingly, executed. It afterwards appeared, by the confession of one of the real murderers, that they had gained admission to the house, which was situated in a narrow street, by means of

In regard to the comparative value of direct and circumstantial evidence, it may be observed, that the latter is of a secondary nature, and cannot be relied on, where the former is in existence, and withheld by the prosecutor, as the rule is, that the best evidence must always be produced. In the abstract, however, these two kinds of evidence do not in strictness admit of comparison; for the force and efficacy of each may be carried to an indefinite extent, and be productive of the highest degree of moral certainty. The peculiar excellence of direct evidence consists in its being more immediate and proximate to the fact; so that, if no doubt arise as to the credibility of the witnesses, there can be none as to the fact to which they testify. The virtue of circumstantial evidence, again, is its freedom from suspicion, on account of the exceeding difficulty of fabricating a number of independent circumstances, naturally connected, and tending to the same conclusion.[1] It need scarcely be remarked, that in the application of circumstantial evidence, much greater caution and vigilance are necessary than where the evidence is of a direct kind.[2]—Direct evidence rarely occurs in occult crimes, such as thefts, premeditated murders,[3] and fire-raising. It is most common in crimes that arise from a sudden impulse of passion, as culpable homicide, assault, riot, and such like. A case of purely direct evidence, without any admixture of circumstances, scarcely ever occurs.

Whatever the nature of the evidence may be, its *sufficiency* can only be determined by its producing conviction on the minds of the jury, to the exclusion of every reasonable doubt; and those doubts only are to be considered reasonable which

a board thrust across the street from an upper window of the opposite house to an upper window of the house of the deceased, and that the murderers retreated by the same way, leaving no trace behind them."

[1] 1 Starkie, 526.

[2] Baron Hume remarks, that in cases of purely circumstantial evidence, the prisoner may be innocent, though the witnesses swear to nothing but the truth: but he adds, "Such is the difficulty of contriving an apt and coherent train of circumstances, that perjury is far more easily detected in cases of this description; and the proper use to be made of the former consideration is not utterly to exclude this sort of evidence, which is often irresistible to the mind, and with respect to many crimes, is the only evidence that can be expected; but to recommend to jurymen to be cautious and reserved, (and in this they are seldom wanting,) as to the sufficiency of the presumptions on which they are to condemn."—2 Hume, 385.—The observation of Lord Hale is, "Tutius semper est errare in acquietando, quam in puniendo, ex parte misericordiæ, quam ex parte justiti[illegible]"

[3] The case of Divan, (1824,) an atrocious case of premedit[illegible] murder, furnishes an instance of direct evidence. In that case, a boy happened to look through the window of the prisoner's house, and saw him come behind his wife, seize her by the head, and cut her throat with a razor.

would weigh with the jury in judging of matters of importance in relation to themselves. It is no reason, therefore, for acquitting the prisoner, that there may be a *possibility* of his innocence; for such possibilities exist in all cases, even of the strongest and most conclusive evidence. Thus, for instance, though a hundred witnesses of the highest character were to swear that they *saw* the crime committed, still there would be no absolute certainty of the prisoner's guilt, because these witnesses might be either falsifying, or mistaken. The evidence of *demonstration*[1] is not applicable to human affairs; and as there is, therefore, always a possibility of error in judicial investigations, so it may sometimes happen that error will occur. Juries, however, must not be deterred from convicting by this consideration. They must be satisfied with evidence which, while it admits a possibility of innocence, excludes all reasonable probability of it.[2] To acquit upon light, trivial, and fanciful suppositions, and remote conjectures, is a virtual violation of the juror's oath, and a crime of great magnitude against the interests of society, as it tends to the hindrance of justice, and the direct en-

[1] The whole objects of the human understanding have been divided into two classes; *abstract ideas*, and *things really existing*. Demonstrative evidence applies to the former of these classes; probable evidence to the latter. A fact resting on demonstrative evidence is necessarily true, as its contrary is impossible, as, for instance, that two and two make four, or that a straight line cannot enclose a space. A fact resting on probable evidence, again, is only probably true, as its contrary is not impossible, and of this kind are all the facts that occur in human affairs. Probable evidence is the only evidence upon which men can act in the business of life, and it can never exclude the possibility of error, for, if it did so, it would cease to be probable evidence. The most probable things are sometimes false, for, if they were exempted from falsity, they would no longer be probable, but certain—that is, they would no longer rest on the evidence of probability, but on the evidence of demonstration.—So far as evidence can be discerned, it ought to influence our practice, for it is as great an imperfection in the moral character not to be influenced by evidence when discerned, as it is in the understanding not to discern it.—Beattie on Truth, p. 35, *et seq.*—Butler's Analogy. Introd.

[2] The following case was stated by the Lord Justice-Clerk Miller in the Court of Session, in delivering his opinion on the Douglas Cause:—John Reid was indicted for stealing six score of sheep from a farm in the county of Peebles. Shortly after the theft, he was seen driving the sheep upon the road leading from the farm towards Glasgow. He was traced to the neighbourhood of Glasgow, where he placed the sheep in an inclosure, and treated with several butchers for the sale of them. Before any bargain was concluded, a surmise arose that the sheep were stolen, upon which he abandoned them, and left the country; but was afterwards apprehended. On his trial, he offered no evidence as to the way in which he obtained the sheep; but the jury, misled by the idea that there could be no legal proof of his guilt, because there was a *possibility* that he might have got the sheep in a lawful way, returned a special verdict from which no guilt could be inferred, and he was accordingly assoilzied. The Court, however, expressed a unanimous opinion that the verdict was erroneous, and contrary to evidence. This case occurred, 15th December, 1766.—Anderson's Report of Speeches in the Douglas Cause, p. 456.

couragement of malefactors. At the same time, however, it is not to be forgotten, that a verdict of guilty ought only to be returned where the evidence is perfectly satisfactory to the minds of the jury, and impresses upon them a conviction so strong, that they would venture to act upon it in matters of the highest concern and importance to their own interests.[1]

[1] See Starkie, 1, 514.—The rule of the civil law is, that evidence to warrant conviction must be "luce meridianâ clarior."—"It must be so clear and convincing, (says Lord Cowper,) that every bystander, the instant he hears it, must be fully satisfied of its truth and certainty. It admits of no surmises, innuendos, forced consequences, or harsh constructions, nor any thing but what is real and substantial, according to the rules of natural justice and equity."—New Parl. Hist. Vol. 8, p. 338.—"Judges (says Lord Bacon) must beware of harsh constructions, and strained inferences, for there is no worse torture than the torture of laws."—Vol. 1, p. 440, Fol. Ed.

PART III.

OF THE NATURE OF CRIMES, AND THE APPLICATION OF EVIDENCE IN PROVING THEM.

SUCH being the nature and principles of the evidence laid before the jury, the next matter for consideration is the qualities of the crimes to which that evidence has to be applied.—Crimes may be considered in reference either to their general qualities, as ascertained by law; or to their individual circumstances, as set forth in the criminal charge, in order to characterise the particular act.

CHAPTER I.

CRIMES CONSIDERED IN REFERENCE TO THEIR GENERAL QUALITIES.

SECTION I.

CRIME IN GENERAL.

BY a crime is understood any act for which the person guilty must make satisfaction to the public, as being an infringement of the social regard due to it.[1]—A malicious intention (or *dole*, as it is called) is essential to crime; and where this intention is deficient, either absolutely, or to a certain degree, there is a consequent proportional freedom from criminality and punishment.

Minority.—Minors, under seven years of age, are held incapable of dole, and are, therefore, not liable to criminal prosecution. Between seven and the age of puberty, (which, in this question, is fourteen years both for males and females,) they are liable to an arbitrary punishment, according to the circumstances of the case. Where they have reached the age of puberty, minors are liable to the ordinary punishment, even capital, for those crimes, such as murder, fire-raising,

[1] 1 Hume, 21.

theft, or the like, of the guilt of which they may be aware. Accordingly, James M'Kenzie, (1793,) at the age of seventeen, had sentence of death for robbery. In the case of Samuel Pirrie, (1786,) for abstracting money from the mail, the jury returned the following verdict:—"Find the pannel, Samuel Pirrie, guilty of the theft libelled; but, in respect of his tender age, *being under, or little above, fourteen years*, his apparent weakness of understanding, his open and candid confession, and that it appears by the evidence that he committed the crime at the instigation and for the benefit of his stepmother, Jean Fitchie, they beg leave humbly to recommend him to the Royal mercy." Sentence of death was pronounced; but the recommendation of the jury had the effect of obtaining a free pardon.[1]

Insanity.—Insane persons are not liable to criminal prosecution, if their insanity amount to a total alienation of reason. It is sufficient, however, to excuse the pannel, that he labours under an illusion which misleads his judgment in the particular case, though he may be aware of the distinction between right and wrong in general; as, for instance, if he believes that a homicide which he has committed was justifiable, as the deceased was a demon, or evil spirit, about to destroy him, while, at the same time, he admits the sinfulness of murder in general.[2] In the case of Ann Sparrow, (1829,) the pannel had poured vitriolic acid down the throat of her child, and nearly killed it; she then ran into the neighbours' houses in a state of evident derangement, saying that she had killed the devil. It appeared that she had frequently expressed her resolution to commit suicide. The jury found that she was insane, and she was ordered to be confined for life.—Cases sometimes occur in a high degree perplexing to the jury; as, for instance, where the pannel was to a great extent blameable, but would not probably have committed the fatal act, but for some constitutional or supervening derangement. In such cases there is a mixture of guilt and misfortune; for the former, the pannel ought to be punished, for the latter, the extreme penalty of the law ought to be remitted. The proper course in such cases seems to be, to find a verdict of guilty, with a recommendation, on account of the pannel's infirmity, to the Royal mercy. This seems to be the proper mode of resolving those cases in which a fatal act has been committed during a sudden and unexpected fit of insanity, arising from excessive drinking. If, however, the pannel was aware that insanity usually followed his ex-

[1] 1 Hume, 33. [2] Id. 37.

cesses in drinking, there seems to be no ground for mitigating his punishment. In the case of William Gates, (1811,) for shooting his wife with a musket, it appeared that *drinking*, and consequent irritability of temper, had a considerable share in the deed, but that, even when sober, he was of a melancholic temperament, and not of firm intellect, or quite like other men. The jury found a verdict of insanity; but Baron Hume's opinion is, that they ought to have convicted, and recommended to the Royal mercy.[1]—Mere weakness of intellect, craziness, or moody temper, are not sufficient to exempt from punishment. In the case of Thomas Gray, (1773,) for murder by stabbing, it appeared that he was of a very weak intellect, subject to sudden gusts of passion, addicted to excessive drinking, and on the whole, considered by his neighbours rather a sort of fool, or crazy person, than a sound man. All this, however, being plainly short of madness, in the sense of the law, he was found guilty of murder.[2]—The plea of insanity is more readily received, when opposed to a charge of murder, assault, or other violent crime, than to those offences, like theft or forgery, which can hardly be executed without art and perseverance. Accordingly, in the case of Thomas Henderson, (1781,) for horse-stealing, the defence of insanity was overruled, as it appeared that he had stolen the horse in the night, conducted himself prudently in the adventure, rode straight by an unfrequented road to a distance, and sold the animal there, and took a bill for the price.[3]—It is sufficient that the insanity exists at the time of committing the deed, though it may not have existed either before or after.—The proof of insanity, as a defence, rests, of course, upon the pannel, and must apply to the particular time when the act was committed. If there is no direct evidence applicable to that period, the situation of the pannel, before and after committing the act, and the general nature of his malady, will form the grounds of determination.[4]—Where insanity is found proven by the jury, (except in cases of delirium, or other temporary bodily disease,) the prisoner is ordered to be confined until his friends find caution to keep him safely during the remainder of his life. If the prisoner is insane when brought to trial, the trial will be delayed till he is so far restored to reason as to be able to conduct his defence.

Intoxication.—Intoxication is no defence. Perhaps, however, in crimes which are punished chiefly on account of the

[1] 1 Hume, 41. [2] Id. 38. [3] Id. 39. [4] Id. 43.

effect which the culprit's influence and example may have on others, as, for instance, the uttering of seditious expressions, it may possibly be a ground of mitigation.[1]

Compulsion and Subjection.—Compulsion and subjection will, in certain cases, excuse and alleviate guilt.—The defence of subjection to the husband will not avail a *wife* in any atrocious crime, as treason, murder, or fire-raising. But, perhaps, if she appear to have been constrained by his orders, it may in venial trespasses exculpate her, and in more grave cases may mitigate her sentence, if she appear less guilty than her husband. A wife, however, is not punishable for harbouring and concealing her husband, even after the commission of the greatest crimes.[2] And this is also true in certain cases of her receiving and concealing the goods which he has stolen. Thus, in the case of Thomas Mallach, and Margaret Rennie, his wife, (1828,) where the husband was charged with theft, and the wife with resetting the articles stolen by him, the Lord Justice-Clerk Boyle recommended to the prosecutor, not to insist in the case against the wife, as it appeared that she merely received the articles into their common house, and hid them there, without having had any hand in vending them to the public, or realizing a profit from the offence.[3]—In the case of a *child*, if there concur great youth, subjection to the parent is a ground for mitigation of punishment in the higher offences, and may operate a total acquittal in the more venial. In the case of Urquharts, father and son, (1797,) for robbing the mail, the son, a boy of sixteen years, was condemned to death, with a recommendation to mercy, though it appeared clearly, that he acted at the instigation of his father.[4]—The subjection of a *servant* to his master is no defence, unless he can shew coercion, and the reasonable fear of violence, against which he had no sure or near protection.[5]—In regard to compulsion by a stranger, it is necessary, in order to make this a good defence, that it could not be withstood or escaped, without immediate danger of death, or great bodily harm; that the party proceeded as little way as was possible in the circumstances; and that, on regaining his freedom, he gave information of the crime, and refunded any profit which he had made by it. This defence is most available in cases of great commotion, as in rebellion, or a great mob, and in cases of piracy.[6]—An officer of the law, who *bona fide* executes a judge's order, not palpably and notoriously illegal, incurs no guilt; and, in like manner,

[1] 1 Hume, 45-7. [2] Id. 47-9. [3] Alison, 670.
[4] 1 Hume, 50. [5] Ibid. [6] Id. 50-1.

a soldier is exculpated by subjection to his officer, if the order was such as falls within the officer's commission, and known customary line of duty, and was at least excusable, and not plainly an injury or aggression.[1]—It may be added, that the compulsion of extreme want is held no excuse for a crime; but it may found an application to the Throne for mercy.[2]

SECTION II.

HOMICIDE.

HOMICIDE is the act by which the life of a human being[3] is taken away. It consists of four kinds;—Casual Homicide; Justifiable Homicide; Culpable Homicide; and Murder.

1. *Casual Homicide.*

Casual homicide takes place where the slaughter is committed accidentally by a person who is lawfully employed, and who neither means harm to any one, nor has been wanting in reasonable caution.[4] Thus it is casual homicide, if a person's gun burst in his hand, and kill a bystander; if a horse run off with its rider, who had reason to believe he could manage it, and kill a passenger; if a cart go over and kill a child in the street, though the driver was going moderately, and at his horse's head; if a steam-boat, owing to the darkness of the night, run down another vessel, and drown the people on board, though every usual precaution had been taken to prevent collision. To constitute casual homicide, it is not necessary that the caution used should be the *utmost* that might have been employed; it is sufficient that it be ordinary and reasonable caution. John Kilgour was tried (1827) for having fired a fowling-piece, loaded with small shot, in a field, in the direction of a high-road, and killed a girl passing at the time. On the proof, it appeared that the shot was a long one, being above fifty yards, and that it proved fatal, only by one of the leads having unfortunately penetrated the child's eye, while the other shot hardly pierced the skin. In these circumstances, the death was held accidental.[5]

[1] 1 Hume, 53-4. [2] Id. 55.
[3] The destruction of a *fœtus*, or unborn infant, though an indictable offence, is not homicide.—1 Hume, 186.
[4] 1 Hume, 194. [5] Alison, 144.

2. *Justifiable Homicide.*

Justifiable homicide is that which the killer is bound or entitled to commit, on grounds either of public or of private duty.[1]

1. Justifiable homicide *from public duty*, occurs in the following cases:—1. Sentence of death lawfully pronounced by a judge, and carried into execution by an officer, properly authorised, and without any essential deviation from the terms of the warrant.[2]—2. Homicide by a magistrate, or by his order, necessarily committed in suppressing a riot, and apprehending the delinquents; and this is justifiable, independently of the riot act having been read, which only makes the *continuance of the assembly beyond a certain time* suppressible by force.[3]—3. Slaughter of a criminal by an officer of justice, or those assisting him, if, from the violent and powerful resistance of the criminal, this be indispensable towards taking and securing him. The same thing is true as to the slaughter of those who take part with the criminal, in resisting the officer. There must be no gross and palpable irregularity in the frame of the warrant on which the officer proceeds, as, for instance, the want of the signature, or of the offender's name; but the officer will not be affected by any extrinsic and remote irregularity, such as an error in the proceedings on which the warrant was obtained. There is no sufficient authority for holding that the officer has power to kill on the mere flight of the delinquent, without resistance.[4]—4. Homicide on resistance of a civil warrant. In this case, the privilege of the officer is not so high as in the execution of criminal process; the rule seems to be, that the officer may kill, if the resistance is such as to give him reason to believe that *his life* shall come to be in danger, if he persist in the execution of his duty.[5] Thus, if a messenger, bearing a caption, finds the door of the debtor's house guarded by a party of his friends, with drawn swords, to oppose his entry, he may fire upon them, though he has not been attacked by them, nor even come within reach of their weapons.[6]—5. Homicide by a soldier or sailor on duty, if he is violently invaded, or any alarming or outrageous tumult is raised against him, though there should be no immediate danger of death. The law intends that he shall, when on duty, do what is necessary to maintain his post, and to preserve his person and arms in a condition to use them with

[1] 1 Hume, 195. [2] Ibid. [3] Id. 197.—See below, "Mobbing."
[4] 1 Hume, 197-200. [5] Id. 203. [6] Id. 203-4.

effect, even though he should thus be obliged to take life. In urgent extremities, where the soldier is in immediate danger of losing his arms, or being disabled, before his officer can interpose to direct him, he is entitled to kill without the command of his officer; and, in similar circumstances, the military party, brought by the civil power to quell a riot, may act without order of the magistrate.[1] Where a soldier has strict orders *not to fire*, he will be justified in killing, only if he make out a clear case of instant peril to his own life, but he will not be justified, if the peril were only to his post or arms.[2]—Homicide committed by soldiers, *when off duty*, is judged of in the same way as if committed by any ordinary citizen.—Homicide is justifiable, which occurs in firing at a vessel, neglecting to bring to, when duly ordered to do so, by a vessel or boat of the navy.[3]—6. Homicide by a revenue officer, in seizing run goods from a smuggler, if such resistance is made to him, as shall manifestly put his life in danger, if he advance and persist in making the seizure.[4] This privilege, which arises from the common law, is sanctioned by statute.[5] The officer is bound, however, (and this is true of all other cases,) to use every reasonable means, by giving warning and otherwise, to fulfil his duty, without sacrificing life.[6]

2. Homicide is justifiable on grounds of *private duty*, in the following cases:—1. Homicide, in defence against an attempt to commit a felony. (1.) The strongest case of this class is an attempt feloniously to kill; as, for instance, suddenly thrusting at a person with a sword from behind, or firing a pistol at him, from the side of the path. The person attacked in this way is not bound to retire, as in the case of danger of life on an occasional quarrel. He is entitled, on the contrary, to oppose force to force, and to secure his own safety, by the immediate death of his assailant. The right to kill is not confined to the person attacked, but belongs also to his friends or servants, or others, who are along with him. If the assailant takes to flight, there seems to be no sufficient authority for holding that the injured party will be justified in pursuing, and putting him to death.[7] (2.) A woman, or any one who is with her, may kill in hindrance of rape, if the perpetration of the crime cannot otherwise be prevented.[8] (3.) A man may kill in defence of his property, where it is invaded in such a forcible and felonious manner, as naturally

1 1 Hume, 205-13. 2 Burnett, 40. 3 1 Hume, 214.
4 Ibid. 5 9th Geo. II. c. 35. 6 1 Hume, 217.
7 Id. 217-18. 8 Id. 218.

puts the owner in fear; otherwise not. For instance, it is not lawful, instead of seizing, instantly to stab a pick-pocket, or to shoot a thief from behind a hedge, or to kill a man, for pulling down inclosures, or for taking game without leave, provided none of these trespasses on property are coupled with an assault on the person, for that is a different question.[1] In the same way, it is not justifiable to kill by means of a spring gun, set in one's grounds, even though notice has been given;[2] or to shoot a resurrection-man, though in the very act of lifting a body.[3] On the other hand, a man attacked on the highway, in a solitary place, to be robbed, may prevent the felony, by the death of the assailant.[4]—If a man break into a house *at night*, to commit theft, murder, rape, or hamesucken, or to burn the house, he may lawfully be killed. This is the case also, though he have not entered, and have not shewn precisely which of these felonies is his object, if he have broken the safe-guard of the building, and is in immediate preparation to enter. Where the safe-guard of the building is not broken, it is unlawful to kill, unless warning has been given, and proper means used to scare the invader.[5] It is likewise unlawful, perhaps murder, intentionally, and without warning, to allow the assailant to enter, and then to shoot him from a safe station within;—for by such measures, the party shews rather a desire to shed the blood of his assailant, than to preserve himself from injury.[6] But it is different, if the invader, notwithstanding all reasonable means to scare him, openly persist in his purpose to force entry.—With respect to house-breaking *in the day*, a stronger case of necessity must be made out for the use of lethal weapons against the thieves, for the alarm, in such a case, is less than where the attack is made at night, and, in general, assistance may be more easily procured. But if the house be in a remote situation, where there is little chance of relief, the inhabitants are entitled to use as strong means of defence, as if the attack had been made during the night.[7]—Where the assailants are numerous, as in the case of a violent and outrageous mob, whether by night or day, the use of force to repel their entry will be permitted *earlier*, than where the violence is threatened by one or two alone.[8]—The felonious intent of the assailant must be manifested, in order to justify the use of lethal weapons, and it is sometimes a question of difficulty, what facts in the conduct of the deceased

1 1 Hume, 218.
2 Syme, 188.
3 Id. 321.
4 1 Hume, 220.
5 Ibid.
6 Ibid.
7 Id. 221.
8 Ibid.—Alison, 107.

are to be held as a manifestation of that intent. George Scott, a butler in a country family, had been left in charge of the house by his master, who had gone from home. A young man in the neighbourhood came one night to visit two of the maids, and not having been admitted by them as usual, he squeezed himself through between two bars of the pantry-window. The noise which this occasioned wakened the butler, who immediately wakened two other men in the house, and proceeded to the pantry, armed with a loaded gun. The deceased, hearing the noise of footsteps approaching, hastened to make his exit, by the same window by which he had entered, but in the hurry he stuck in the bars, and was in the act of striving to force his shoulders through, when the pannel entered. He immediately called out to the deceased to tell his name, or he would fire, and having called out again, without receiving any answer, he fired, and killed the man. The Court held, that this use of lethal weapons was precipitate; that the pannel being armed, and supported by two other men, was in no actual danger; that the shot was fired when the deceased was striving to escape; and that the mere fact of not having answered did not, in these circumstances, warrant the use of lethal weapons. The pannel was found guilty of culpable homicide, and had sentence of imprisonment for nine months.[1]—It is laid down by some of our writers, that a thief may be killed in the act of running away with property, if he cannot otherwise be taken, or the goods secured;[2] but this doctrine seems to be doubtful. Lord Justice-Clerk Boyle, in the case of Craw, (1827,) observed, that "the *lowest* provocation or species of invasion, which in our law at all excuses homicide, is that of a person breaking in to steal by night."[3]—2. Homicide in defence of life, on a sudden quarrel. To justify the accused, it must appear that the homicide was committed in order *to save his life*, and not from any inferior motive. He will not therefore be justified if he kill to avoid some great indignity, or even some bodily harm, such as being horse-whipped, or kicked down stairs.[4] It is not sufficient, that the attack made upon him is such, that it may come to put his life in danger, or that it previously was such as did put his life in danger; the danger of life must be at the moment of killing.[5] The pannel's apprehension of

[1] Alison, 105. [2] Burnett, 57.—1 Hume, 222. [3] Syme, 219.
[4] 1 Hume, 223.
[5] Id. 224-5.—The accused, however, is entitled to kill before matters have gone so far as to hinder him from defending himself with effect. Thus he is not obliged to wait till the pistol is in the very act of being fired, or the sword within an inch of his breast.—1 Hume, 229.

danger to his life must be reasonable, and well grounded in the circumstances of the situation. Thus, if one mistake some harmless instrument for a pistol presented at one's head, and kill the supposed assassin, the act is not free from blame; because, with due caution, such misfortunes may always be avoided.[1]—It is not a sufficient necessity for killing, if the accused might have made his escape by running away or otherwise, but chooses to abide the assault, out of pride or humour. The same is true also of one who stands a mortal assault, rather than yield himself to the officers of justice, because he is innocent, or because they mistake him for another,—an error which he observes, but declines to explain. A man, however, is not bound to retire, if he thereby materially increases his own danger, or puts himself to evident disadvantage with respect to his defence; as, for instance, if he have to retire down a dark steep stair-case, or by passages better known to his opponent than to him.[2]—The pannel must confine himself to the just degree and measure of resistance, both in regard to his weapons, and the time and manner of using them.[3] Thus, if a man is attacked by a person of superior strength with a *club* or *bludgeon*, in a chamber from which he cannot immediately escape, and in his alarm draws his *sword* and kills; and if it is proved that there was help within call, or a staff at hand, which he might have used, the act will not be considered entirely justifiable.[4] The precipitate assumption of *lethal weapons*, where such are not used by the opponent, most frequently constitutes guilt in this class of cases. If the pannel only oppose force to force, and resist with the *kind of weapons* with which he is assailed, his conduct, be the consequences what they may, will be blameless. But if two persons attack a man, the one with a sword, and the other with a staff, the person attacked is entitled to use his sword even against the latter.[5] The pannel is not justifiable if he continues the violence longer, or does more than is necessary to disable the assailant, and so to save his own life.[6]—The accused must not in any degree be himself the cause of the fatal strife. Thus, in appointments to fight, or duels, the act of homicide is not justifiable, even where the accused, on coming to the ground, is compelled to kill, in order to save his own life; such an act is held in our law to be murder, because the danger and necessity have been oc-

[1] 1 Hume, 224. [2] Id. 229.
[3] This is termed, in legal language, *Moderamen inculpatæ tutelæ.*
[4] 1 Hume, 227. [5] Id. 230. [6] Id. 228.

cautioned by the pannel himself.[1] The like rule of judgment is, *a fortiori*, applicable in the case of a sudden rencounter, where the accused has provoked the quarrel, by assaulting the person killed, or even by using towards him derisive and contumelious language or gestures.[2]

Casual and justifiable homicide are, of course, not punishable.

3. *Culpable Homicide.*

Culpable homicide is of different kinds and degrees.

1. It is culpable homicide, where slaughter follows in doing a lawful act, without due caution, as if a man leaves his fowling-piece loaded, and afterwards kills in trying the lock, having forgot the condition in which he left it; or if workmen on the roof of a building, by the side of a highway, throw down rubbish, and kill a passenger without giving timely warning; or if a quack, or ignorant practitioner, kill a patient by rashly administering powerful medicines, or one dose instead of another.[3] The most frequent and important cases of this class, are those where death has been occasioned by the improper management of carriages and steam-vessels; the degree of care which the law requires in the management of these vehicles, being proportioned to the great danger incurred by the public, where their proper management is neglected.[4] In driving a carriage along ordinary roads, and still more in the streets of a town or village, the driver is bound to obey the following rules; and if a fatal accident should occur from the neglect of any of them, he will be held guilty of culpable homicide: (1.) To drive at a moderate pace, and never run races with another vehicle. (2.) To have his horses well on hand, so as to be able easily to pull up. (3.) To keep a good look-out, and never on any account to go on the foot-path. (4.) To keep on the customary side, on passing another carriage or horseman. (5.) If he should have occasion to stop, not to leave his horses' head without some one to

[1] 1 Hume, 230.—Though the taking of life in duels constitutes murder in all cases, and to all the parties concerned, yet such has been the natural and humane sympathy both of Courts and juries, with the alternative to which men are sometimes reduced of fighting a duel, or losing their station in society, that there is no modern instance of a capital conviction on such a charge, where there has been nothing dishonourable in the conduct of the accused.

[2] 1 Hume, 232-3. [3] Id. 192-3.

[4] Furious or improper driving along the high-road, if it occasions injury to the persons or property of others, is an indictable offence, though no fatal accident should occur. The same is true of the culpable or negligent steering of steam-boats or sailing vessels.—Alison, 625-8.

watch them, unless he is perfectly secure that they will not run off. (6.) The proper place for a carter, within the tolls of a town or village, or wherever there is a considerable concourse of passengers on the road, is at his horse's head.[1]—The lower orders in Scotland are often culpably careless in going into the middle of the road, and allowing their children to do so, when carriages are passing. It is scarcely necessary to observe, that where an accident occurs on this account—the driver being duly careful—no blame will attach to him. —No case has yet occurred of homicide of persons *within* the carriage, in consequence of the mismanagement of the vehicle; but there is no doubt that such a charge is relevant.[2]—In the navigation of steam-vessels, the master and pilot are bound to obey the following rules: (1.) To have one or more persons constantly on the look-out, in such a situation as to have a clear view of the course which the vessel is taking. These persons are generally stationed at the bows, but it is not unusual for the master to take that duty on himself, standing on the paddle-box; it is not sufficient to entrust this office to the man at the helm, for his vision is frequently obstructed by the passengers or luggage on deck. (2.) At night, or in hazy weather, to have a light constantly burning on a conspicuous part of the vessel; and where the channel is very crowded, to take, where usually practised, the additional precaution of ringing a bell, or sounding a horn. (3.) In passing a vessel in motion, to observe the ordinary rules, viz. in meeting each other, each keeps to his own left; in overtaking one sailing in the same direction, the one proposing to pass steers to the right, the other to the left. (4.) The vessel having the advantage of the wind and tide, makes way for the one beating up against them; and the vessel in motion is bound to avoid the one stationary or at anchor. (5.) The man at the helm is bound to obey the orders of the captain; and the man on the look-out is exonered, if he gives the due notification to the former of these parties. (6.) When a pilot is taken on board for a particular piece of navigation, he is, for the time, responsible for the navigation of the vessel.[3]

2. It is culpable homicide, where death follows in doing an unlawful act, though without malice to any individual; such as the discharging of fire-arms, or the throwing of stones or fire-works, in the streets of a city, or the whipping of a horse there, so that it springs forward and kills a passenger.[4] In the case of Niven, (1795,) who had killed a

[1] Alison, 116. [2] Id. 120. [3] Id. 123. [4] 1 Hume, 234.

person by firing his piece in a street of common passage, the Court were of opinion, that, even on his own allegation, that a bit of iron had *accidentally* gone into the loading, he was guilty of culpable homicide.[1] In like manner, if a poacher, while shooting at game, kill a person, this is culpable homicide; and the same thing is true if a person kill another while shooting at a fowl, intending to steal it.[2]

3. It is culpable homicide where death ensues in pursuance of an intention not to kill, but to do some inferior bodily harm, from which it was not probable that death would follow. In the case of James Irving, (1815,) it appeared, that the pannel and the deceased had not quarrelled, but some wrestling and boxing had taken place, in the course of which the deceased, though the stronger man, was, from an unlucky hit, thrown backwards, pitched on his head, and died from concussion of the brain. This was held culpable homicide; and the pannel had imprisonment for one month.[3] In the case of Angus Cameron, (1811,) it appeared that death had been occasioned by a kick, but the deceased laboured under a rupture, which was unknown to the pannel, and the injury would not otherwise have proved mortal. It was found culpable homicide. The like was found in the case of Adam Philip, (1818,) who had administered nine glasses of spirits to a boy of ten years of age, in consequence of which he died.[4]—A preceptor, who kills his pupil by excessive personal correction, is guilty of culpable homicide.[5]—In the case of Campbell and Helm, (1827,) it appeared that the pannels, without the least provocation, had assaulted the deceased, dragged him from a hovel where he was lying, and struck him some hard blows on the head with their fists, one of which knocked him to the ground, and he fell on some projecting stones, which fractured his skull. The conduct of the pannels was cruel in the extreme, but the injury they inflicted could not have been anticipated to produce fatal consequences, and would not have done so, but for the accidental fall on the stones. They were convicted of culpable homicide, and transported for seven years.[6]—In distinguishing between homicide of this kind and murder, the great point to examine is, whether the whole evidence indicates that the pannel was utterly reckless of the consequences of the outrage which he committed; or was guilty merely of that inferior or measured degree of violence from

[1] 1 Hume, 192.
[2] Burnett, 6.
[3] 1 Hume, 234.
[4] Id. 237.
[5] Ibid.
[6] Syme, 255.

which fatal consequences could not reasonably have been anticipated. In the first case, the crime is justly deemed murder; in the second, the more equitable, as well as humane, construction is for culpable homicide.

4. A still higher species of culpable homicide is that where the killer is actuated by *a mortal purpose*, but which purpose arises not from hatred of the deceased, but from sudden resentment, occasioned by high and real injuries sustained by the killer, accompanied by such terror and perturbation of spirits, as, in a certain sense, deprive him of the command of reason.[1] Crimes of this kind generally occur in sudden quarrels, in which at first both parties were in some degree to blame. In the case of Buchanan and Lilburn, (1771,) it appeared, that the prisoners were attacked by a mastiff-dog, set upon them by the deceased and his associates. High words ensued between the parties, in the course of which the prisoners, irritated by the continued attack of the dog, struck the deceased on the head with a spit, of which he died on the following day. This was held to be culpable homicide.[2] The like judgment was given in the case of James M'Ghie, (1791,) who killed a man by striking him on the head with a pair of heavy iron tongs, while lying on the ground. The defence of the pannel rested on the provocation and alarm of a violent assault made by the deceased on his father in his presence, by throwing him to the ground, and severely beating him in that situation. He was banished from Scotland for seven years.[3] The provocation or injury must be serious and severe, and generally such as is attended with a dread of farther harm, as well as present smart and pain of body,[4] so that the sufferer is in some degree *excusable* for the loss of his presence of mind. No provocation by words or gestures, however insulting, is sufficient; nor even a rude and contemptuous freedom taken with a man's person, as, for instance, by jostling him in passing, or pulling his nose.[5] In the noted case of Mungo Campbell, (1769,) for the murder of the Earl of Eglinton, it appeared, that the deceased had desired the pannel, who had been trespassing on his estate, to deliver up his gun. This the pannel refused, and earnestly begged his Lordship to keep off, or he would shoot him. The pannel was at this time retiring backwards, and he tripped, and fell; and the

1 Hume, 239, *et seq*. 2 Burnett, 14. 3 1 Hume, 246.

4 The only exception seems to be the very peculiar case of a husband killing the adulterer, *caught in the commission of the act*. This has been held to be culpable homicide.—1 Hume, 245.

5 1 Hume, 249.

deceased having paused for a moment, at the distance of two or three yards from him, the pannel raised himself upon his elbow, discharged the gun, and killed the deceased. This was justly held to be murder, the deed having proceeded rather from deliberate resentment, than from any excusable perturbation, terror, or immediate distress of body.[1] The defence of provocation and injury is always excluded, where, from the whole circumstances of the offender's behaviour, he appears to have acted deliberately, and to have been *master of his emotions.* Where the fatal act proceeds on a principle of revenge, it is always murder.[2]

In conclusion, it may be remarked, that in trials for murder, juries sometimes, *in order to save the offender's life,* return a verdict of culpable homicide, where the facts of the case warrant a conviction of murder. It is sufficient to state, that juries have no right to act in this manner; and where they do so, they are guilty of a palpable violation of their oath of office. It is the duty of juries to return a verdict in precise conformity with the evidence laid before them, whatever that may be, and they have it in their power, where the case presents any alleviating circumstances, to adject to their verdict a recommendation to mercy, and such recommendation will always be duly attended to in the proper quarter. This course (to mention one instance) was followed with great propriety in the case of Andrew Ewart, 1828. In that case, the pannel, along with seven other persons, had assembled to watch the graves in a church-yard, where recent depredations had been committed by resurrection-men. In making his rounds, armed with a gun, the pannel met the deceased at a corner of the church-yard, who had also a gun in his hand, and was, in fact, one of the party watching the graves. In the dark he took him for a resurrection-man, and at the distance of two or three yards fired, and shot him. The Court held this to be murder, as the killing of the deceased, *had he really been a resurrection-man,* would have been murder in the circumstances which occurred. The jury found the prisoner guilty of murder, but strongly and earnestly recommended him to mercy. He was accordingly condemned to death; but the Crown, acceding to the recommendation of the jury, commuted his punishment to imprisonment for twelve months.[3]

The punishment of culpable homicide is arbitrary, and varies, according to the degree of guilt, from imprisonment

[1] 1 Hume, 249. [2] Id. 252. [3] Syme, 321.

for a few weeks, to transportation for life. In some few cases, scourging has been superadded.

4. *Murder.*

Murder is homicide done wilfully, and of malice aforethought; by which is understood that it is done with a wicked and mischievous purpose, as distinguished from motives of duty, necessity, or allowable infirmity.[1] It is not necessary to prove, that the wicked purpose was special to the person killed; thus, it is murder, though John be killed by mistake instead of James, unless the killing of James would have been justifiable, or excusable. Nor is it necessary to prove an intention to injure any one in particular; thus, it is murder if a man, without sufficient cause, fire a gun among a crowd, or in a place of public resort, and kill a person.[2] It is not necessary to prove the existence of malice prior to the meeting of the parties; the existence of malice at the time of killing is all that is necessary, and this is implied in the act of killing itself.[3] It, therefore, lies with the pannel, in making good his defence, to *disprove* the malice, which the law presumes to exist.—A deliberate design to kill is not essential to the crime of murder; a corrupt recklessness of the life of the sufferer is sufficient, and equally constitutes the malice or depraved purpose which the law requires. Thus, if a man assaults his neighbour, meaning to beat him severely, or break his bones, or cut out his tongue, and if, in the prosecution of this purpose, he destroys his victim, he is equally guilty as if he had run him through the body with a sword.[4] In the case of Brown, (1753,) it appeared that a father and son were both concerned in an assault, and the father, having seized the deceased, called to the son "to pay well, *but spare the life.*" The son, with a cudgel, having beat the man so severely that he died, the father had sentence of death.[5] A similar judgment was given in the case of Williams, (1800,) where the pannel had declared his resolution to beat the deceased "*so as just to leave life in her,*" and having beat her accordingly, she died next day.[6] In the case of Joseph Rae, (1817,) it appeared that the deceased, a chimney-sweep boy of eleven years of age, having stuck fast in a vent, the pannel fastened ropes to his legs, which he drew with great force, till the boy died,

[1] 1 Hume, 254. [2] Id. 22-3. [3] Id. 254.
[4] Id. 256. [5] Burnett, 4. [6] 1 Hume, 257.

notwithstanding the remonstrances of the bystanders, and the cries of the deceased. This was held to be murder,—the conduct of the pannel having been such as indicated an utter recklessness, and indifference as to the life of his victim.[1] In the case of John Cowan, (1803,) it appeared that he had killed the deceased, (his wife,) by beating her with a stick, and on the interference of his neighbours, he declared that "he would beat her, *though he should hang at the west end for it.*" He was convicted of murder, and had sentence of death.[2]—It is not necessary, as appears from these cases, that the weapon employed should be of that kind which, in ordinary language, is termed *lethal*, as a sword, knife, or pistol. The law holds every weapon to be lethal, by which a human being has died; and in order to determine with what purpose it has been used, regard must be had not only to the weapon itself, but to the manner of using it, the repetition of the blows, the comparative age and strength of the parties, the words uttered on the occasion, and all the other particulars of the story.[3] Thus, in the case of James Brown, (1735,) the pannel was convicted of the murder of his mother, by striking her *with the hand*, and treading her under foot; and in the case of Malcolm Brown, (1664,) it was held to be murder, that the pannel had killed a *boy by a blow on the ear with his fist.*[4] Of course, the pannel will be favourably judged of in those cases, where, having a lethal and dangerous weapon in his power, he abstains from using it, and betakes himself to one of a more harmless description, unless that circumstance shall be outweighed by some great excess afterwards. Thus, in the case of Richard Hamilton, (1807,) the accused had killed an infirm old woman, by several blows on the head with his fist; but, before doing so, he had thrown aside a mell, or hammer, which he had used in breaking into her room; he was, accordingly, found guilty of culpable homicide only.[5]—If a person administer a potion to a woman, without her knowledge, to produce abortion, and if she die in consequence, this is murder, if the potion was of so powerful a nature as evidently to put the woman's life in hazard.[6] In such a case, there is the same disregard of life as there is where outward violence is done to the person. In like manner, if one wilfully set fire to a stack-yard, and the flames spread to a dwelling-house, and kill any of the in-

[1] 1 Hume, 258. [2] Id. 257. [3] Id. 268. [4] Id. 262. [5] Id. 256.
[6] Id. 263.—The administering of laudanum, or other narcotic or deleterious drugs, with intent to produce stupefaction, whether in malice, or to facilitate the commission of any crime, is an indictable offence, though no fatal result ensues.—Case of Wilson and others, 1828.—Alison, 629.

mates, this is murder; and the same seems to be true, where a man sets fire to his own house, in order to defraud the underwriters, and a person is destroyed in consequence. So, also, if a person, with intent to rob, attack a passenger, who resists, and in the struggle the passenger is killed, this is murder, even although the robber has carried out no lethal weapon, and the fatal result ensue, from the passenger falling in the struggle, and breaking his neck.[1] If, however, the killing take place, in pursuance of a delinquency, which is neither of a capital nature, nor one from which danger of life could be reasonably expected, the crime is not murder, but culpable homicide only.[2]

Art and Part of Murder.—A person, though not committing murder with his own hand, is, in certain circumstances, *art and part* of the crime, that is to say, he is accessory to it, and equally guilty as the immediate agent in the deed.—1. *Accession at the Fact.*—Thus, if a number conspire, and lie in wait to kill a certain person, it signifies nothing who gives the mortal blow, or how few blows are given. The individual who strikes is but the executioner of their common design, and they, by their presence, are aiding and abetting, and ready to support him in its execution; they are all, therefore, equally guilty. The same thing is true, though the design, in such a case, were only to give a severe beating, if death ensues in consequence.[3] This rule is applicable, not only to those cases where an express compact can be proved, but to all in which, from the number, arms, words, and behaviour of the persons engaged, an implied and tacit confederacy may reasonably be inferred.[4]—Every person shall be deemed to be present at the deed who in any shape facilitates or protects the execution of it. One, for instance, gives notice of the person's approach, by a signal from a distance, a second dispatches him at a spot agreed on, and a third takes post at a convenient place to prevent interruption, or favour their escape; all are in one degree of guilt.[5] The same is, of course, true in regard to those who impede, disconcert, or intimidate the sufferer in his defence, as by holding his hands, depriving him of his weapon, or the like. Art and part is also implied in all commands and exhortations to the deed, given upon the spot. Thus, in the case of Davis and Wiltshire, (1740,) it appeared that, in the course of a scuffle, one of the pannels called out to the other to fire, which he did accordingly, and killed the person with whom they were

[1] 1 Hume, 24-5. [2] See before, p. 77. [3] 1 Hume, 264-5.
[4] Id. 265. [5] Ibid.

struggling; this was held to be murder in both.[1]—What is true of homicide, committed in pursuance of a concert to kill, or to do some grievous bodily harm, is equally so of homicide done in prosecution of *any other felony*, provided the nature of the attempt imply, or the behaviour of the parties indicate, a unity of purpose in all concerned, and a resolution to control resistance by numbers and force. Thus, if several go out to rob on the highway, armed, and one of them kill in the assault, it is murder in all the individuals of the party, whether present on the spot or not. In the same way, in housebreaking, if one of the party kills a person in the house, either to subdue resistance, or otherwise, those who are watching without are art and part of the murder.[2]—Where the assemblage of persons is very numerous, it is often difficult to prove the unity of purpose which the law requires; but this difficulty of proof forms the only difference between such a case, and one where the numbers are smaller. Thus, in the case of the Porteous Mob, where the tumult originated in a mortal enmity against a certain person, who lost his life in consequence, all who were found in the assemblage, equipped with arms, were held to be implicated in the murder.[3] Indeed, where the unity of purpose is once proved, much less accession will serve to convict a person as art and part, where there is a large assemblage of persons, than where the numbers are more scanty; because the share of the enterprise falling to each individual is necessarily diminished by the number of his associates. On the other hand, where there is no proof of concert, or where the concert is of such a kind as not, on reasonable probability, to lead to a fatal result, the actual authors of the homicide are alone guilty of that crime. Such is the rule of judgment, where the killer strikes on some peculiar quarrel of his own, not connected with the original design, or, though it be in some degree connected with that design, if a resolution of the whole party, to accomplish their object by such extreme means, cannot reasonably be inferred in the whole circumstances of the case.[4] In like manner, in sudden brawls or riots, those only who have taken a part in the homicide that ensues are implicated in that crime. If, in such a case, the sufferer has died in consequence of a series of inconsiderable injuries, or if the author of the mortal blow be unknown, the fair result is, to hold those guilty of assault who are proven to have struck the deceased, and to acquit the others

[1] 1 Hume, 268. [2] Ibid. [3] Id. 269. [4] Id. 270.

against whom no act of violence is proved.[1] Thus, in the case of Marshall and others, (1824,) charged with murder, assault, and riot, it appeared, that in a quarrel which had arisen in the street, apparently without any foundation, blows had been freely exchanged on both sides, and a person killed. There was clear evidence to fix the assault on the pannels, but great uncertainty as to which of them struck the fatal blow. It was laid down by the Court, that, in such a case, where there was no evidence of previous concert, and where the quarrel had been taken up at the moment, the crime of murder could not be fixed on any of the pannels, unless the jury were satisfied that he struck the fatal, or one of the fatal blows. They were, accordingly, acquitted of the murder, but convicted of the assault and riot.[2]—Where homicide takes place among persons *lawfully assembled*, art and part can only be fixed upon an individual by strong evidence of co-operation in the deed; and this is, *a fortiori*, true, where the assembly has for its object the execution of the law, as, for instance, a magistrate's *posse* proceeding to quell a tumult.[3]——2. *Accession before the Fact.*—A person is art and part of murder, as an accessary *before the fact*, who, knowing the mortal purpose, furnishes the immediate means of committing the deed, those means, without which, it either could not have been done at all, or would have been done in a different manner; for example, if he furnishes the poison, or arms, or decoys the victim to the spot.[4] Thus, if one furnish a highwayman with pistols, or a housebreaker with picklocks, knowing what they are about to commit, and death ensue in the pursuance of these felonies, the furnisher will be held guilty of murder.[5] It is different where the assistance is indirect and remote. Suppose, for instance, that John reveals to James his purpose of revenge against a certain person, their common enemy, and that James lends him a horse, or furnishes him with money, to carry him to that quarter of the country. Though highly blameable, James is not art and part of the murder, if John takes the life of the person in question, without holding any further intercourse with James, or communicating to him any of the particulars of the design, as to the time, place, and manner of doing the deed. In such a case, James, though he has assisted the *man*, has had no concern in the *story of the murder*, which is alone the matter of charge.[6]—The assistance must also be material; such as substantially forwards the enterprise.

[1] 1 Hume, 272. [2] Alison, 64.—See also 1 Hume, 272.
[3] 1 Hume, 270-1. [4] Id. 274-6. [5] Burnett, 268. [6] 1 Hume, 267.

Thus, it will not be sufficient, if the pannel lend the assassin his watch, that he may be more sure of the hour to lie in wait for the person, or tell him the nearest road to the lurking-place.[1]—A person may be art and part of murder, by simply giving orders to do the deed, as, for instance, an officer commanding his party to fire on the populace;—or by hiring to do the deed, for, in that case, the actor is only an instrument in the hands of his employer;—or by advising it, if the advice be direct and special, and the slayer's main inducement. If the person giving the order to kill have seriously countermanded it, this will free him, if the countermand reach the murderer in time; otherwise not.[2] Though the order only extend to giving a severe beating, or robbing the person, or burning his house, or giving a woman medicine to procure abortion, the person giving the order is liable as a murderer, if death follow in any of these cases.[3] The person giving the order to kill is liable, though there may have been a variation from his instructions in the mode of executing the order, as by stabbing in place of shooting; or though the person employed have killed a wrong man by mistake;[4] or though the mandate has not been executed by the person who first received it, but by another employed by him.[5]——3. *Accession after the Fact.*—Accession *after the fact*, such as concealing the corpse, assisting the murderer, or expressing approbation of the deed, does not, of itself, make a man art and part of the murder. Such accession, however, may contribute materially to the proof of participation in the crime, when joined with circumstances of previous knowledge, or instigation to commit the deed.[6]

The punishment of murder is death, and confiscation of moveables; to which, by special statute, feeding on bread and water up to the time of execution, and suspension of the body in chains, or interment within the precincts of the prison, are superadded.[7] Where the sentence is not carried into execution—and likewise in cases of culpable homicide—the offender is liable in a sum of money, called *assythment*, to the widow and children, or other next of kin, of the deceased.[8]

[1] 1 Hume, 277. [2] Id. 278-9. [3] Burnett, 367. [4] 1 Hume, 280.
[5] Burnett, 266.
[6] 1 Hume, 281.—It may be remarked, that the principal and accessary may be tried on the same libel, and at the same time; or the trial of the accessary may take place, though the principal has neither been tried, fugitated, nor is in custody.—1 Hume, 283.
[7] 2d and 3d William IV. c. 75.
[8] 1 Hume, 284.

Evidence in Homicide.

The circumstances tending to prove the pannel's connexion with the homicide are extremely various, and do not admit of any accurate classification. Those which usually occur have been already noticed in treating of the general principles of evidence, and need not be farther adverted to. The proof of the *corpus delicti*—or the actual existence of the homicide, *as disconnected with the prisoner*—remains still to be explained. This branch of the case, which is sometimes attended with considerable difficulty, involves the questions, whether the person alleged to be killed is dead, and whether he died of the alleged injury; it is scarcely necessary to say, that when any doubt exists as to these points, no weight can be attached to the circumstances which appear to connect the prisoner with the crime. The proof of the *corpus delicti* generally rests on the evidence of persons who have seen and examined the dead body.

Discovery, and Identification of Body.—Where the body is amissing, there ought properly to be no conviction; unless the circumstances are such as to give rise to an inevitable inference of the sufferer's death, as, for instance, where a person is violently struck on shipboard, and thrown into the sea, and never again seen.[1] If a body be found, though so disfigured that it cannot be recognized, it will aid the proof of the *corpus delicti*, if the circumstances of the finding correspond with those of the alleged homicide. In the case of M'Cowan, (1750,) for murdering a woman and her child, the bodies found were so mangled that they could not be recognized, but certain articles were found lying near them, which were proved to have belonged to the woman. There was strong evidence connecting the prisoner with the crime; the result was a verdict of guilty.[2] The difficulty of identifying dead bodies arises very often from the natural progress of decay, and the change which death almost always produces on the human countenance. It is the duty of juries to listen with caution to evidence of identity, when given in cases of this kind.[3]

Cause of Death.—Where the body has been found, and recognized, a question may arise as to whether the death was occasioned by the alleged violence. This matter, in general, depends upon medical testimony.

1. It is sometimes doubtful whether death may not have

[1] Burnett, 596. [2] Id. 539. [3] See before, p. 38-9.

been occasioned by *disease*, or some other cause not connected with the injury. In the case of Keith and Watt, (1766,) for murder by strangulation, it appeared that no medical person had seen the deceased during his last illness, or after death; but some of the neighbours swore to a bluish mark round the neck of the corpse, and bruises or discoloration on the breast, and a physician deponed that he never saw a bluish mark, *occasioned by disease*, round the neck of a dead body. On the other hand, it was proved that the deceased, about a week before his death, had been ill of asthma, and thought by his physician to be dying. Upon this evidence, joined with circumstances of suspicion in the conduct of the pannels, a conviction was obtained. The pannels, however, were afterwards pardoned.[1] In the case of Harkness, (1797,) the deceased was found lying on the street, in such a posture as to shew that he had been brought and laid down there. The surgeons were not agreed as to the immediate cause of death. There was a wound on the head, but whether occasioned by a blow or a fall seemed doubtful. On opening the head, the vessels appeared loaded with blood. Verdict not guilty.[2]—Where sudden death occurs during an affray, it is often doubtful whether the fatal event has not arisen from the violent mental excitement of the deceased. There are many instances of death occurring in this way, either by apoplexy, or some other mortal disease. In the course of an altercation between a man and his wife, the woman died, and a clamour having arisen against the husband, he was brought to trial for having murdered her. He was, however, acquitted, for it appeared in evidence that he had not even touched the woman during the quarrel. The deceased was a person of an extremely violent temper; and on opening her body, it was found that she had laboured under suppuration of the liver, and that an abscess had burst into the cavity of the abdomen, in consequence of the agitation into which she had been thrown.[3] In the case of M'Donald, (1799,) it appeared that, *in the course of a quarrel*, the prisoner gave the deceased (a man) a blow on the left breast, but whether with his open or clenched hand did not appear. The deceased stepped back a little, and then fell forwards on his face, uttering these words, "See how he has struck me," and in a short time expired. On opening the body, the appearances were natural, except some extravasated blood in the ventricles of the brain. The surgeons could not say with certainty what was the cause of death, and one of them

[1] Burnett, 540. [2] Id. 542. [3] Smith's For. Med.

(Mr. John Bell) stated, that the appearances in the head could not have been produced by a blow on the breast, or even by a fall. The jury, of course, acquitted.[1]—Where the person is in a state of intoxication, a comparatively slight injury may occasion death. A man, finding his wife drinking and dancing in a gin-shop, brought her home, and a struggle ensuing between them, he struck her twice, and the woman shortly afterwards died. Mr. C. Bell, on the trial of the husband, deponed, that the woman's death was occasioned by the bursting of an artery in the head. Being asked whether the blows were the cause of the rupture, he said he conceived it very likely that a shock would rupture the vessel, and that the intoxication of the deceased, and the struggle, were likely to produce such a degree of activity of the circulation in the head, that a less violent blow might produce rupture, than what, in other circumstances, would have proved fatal. The prisoner was acquitted.[2]

But, in general, the cases which occasion most difficulty in distinguishing between violent and natural death, are cases of *poisoning*. The best and most direct evidence, in cases of this kind, is the existence of poison in the body of the deceased, especially when it appears that the symptoms preceding death, and the appearances on dissection afterwards, are such as correspond with the known operation of the particular poison. Evidence of this kind, however, is, by no means, essential to conviction. Indeed, it often happens, from various causes, that poison is not found in the body, while the other circumstances of the case afford the most conclusive evidence that poison was the cause of death. In the case of Matthew Hay, (1780,) it appeared that he bought arsenic, as he said, to kill rats. A young woman, who was pregnant by him, and who was engaged in making sowens for the family, was sent out of the house by him to bring a drink, and he had thus an opportunity of putting arsenic into the pot, but it was not proved that he did so. Five persons who partook of the sowens were taken ill immediately with the usual symptoms of poison, and two of them died that night. The body of one of these persons was opened, but no poison was found in it, though there was some appearance of mortification in the stomach. Upon examination, arsenic was found among the sowens. The prisoner was found guilty.[3] In the case of Jean Aitken, (1830,) the pannel was indicted for the murder of her hus-

[1] Burnett, 542. [2] Shaw's Manual of Anatomy, p. 165. [3] Burnett, 546.

band, by pouring sulphuric acid down his throat, as he lay asleep in bed. It appeared that the pannel and her husband had frequent quarrels, and that she had frequently threatened to murder him. On the night in question, they had a severe struggle, and struck each other. About twelve at night the deceased went to bed, and soon after was seen asleep, there being no person in the house but the pannel and a servant-maid. The pannel then left the servant's room on her stocking soles, a thing unusual with her, and was absent about twenty minutes; when she returned, she said that her husband was roaring mad with drink, and the servant, upon going to him, found him lying on his back in the utmost agony, exclaiming that he was all roasting. A glass was found upon the table, which, on being put to the lips, produced a sharp pain, and a phial in the deceased's room, which had contained three tea-spoonfuls of sulphuric acid, was found next morning to have only as much in it as covered the bottom of the phial. The death of the deceased took place in two days, apparently from the effects of a corrosive acid; and sulphuric acid, in considerable quantities, was detected on his shirt, and on the blankets and bedcover, and a little on the pannel's bed-gown and handkerchief, but none was discovered in his stomach and intestines. The jury unanimously found the pannel guilty; and next day she confessed the crime.[1]

[1] Alison, 75.—It may be useful to add a few observations regarding the poisons generally employed in the commission of crimes.

ARSENIC (*arsenious acid*, or *white oxide of arsenic*) is most frequently selected as the instrument of murder. Its taste is said by Professor Christison to be insipid or sweetish; by most other writers, it is represented as acrid and corrosive, but not to a degree corresponding with its virulence. It has frequently been swallowed with victuals and drink without any peculiar taste being perceived. It feels *gritty* or sandy under the teeth. When reduced to powder, it bears a strong resemblance to refined sugar, with which it has been often mingled for criminal purposes. It dissolves in water, and may be easily administered in that fluid. It is probable that the lowest fatal dose, in circumstances favourable to its action, is about four grains. It would seem that its activity may be diminished by admixture with certain insoluble powders, as, for instance, charcoal powder.—Christison's Treatise on Poisons, 212-13.—The symptoms of poisoning by arsenic are generally sickness; heat; violent thirst; inexpressible uneasiness, and anxiety; vomiting; purging; quick and feeble pulse; headache; distended and painful abdomen; fœtid discharges, sometimes mixed with blood; excruciating pains in the stomach and bowels; cold sweats; cramps in the limbs; and occasionally near the close, convulsions.—2 Paris and Fonb. 216-20.—These symptoms rarely occur united, and in some cases the greater part of them are absent; they resemble, in many respects, the symptoms of common British cholera; and, accordingly, in doubtful cases, the age and constitutional predisposition of the sufferer, his habit with respect to diet, the season of the year, and the prevailing epidemics, are circumstances to be kept in view.—2 Paris and Fonb. 155.—The symptoms of arsenic ge-

2. A difficult class of cases, in regard to the cause of death, are those in which an injury, not in itself dangerous, becomes mortal, after an interval of time, in consequence of some *supervening and unforeseen circumstance.* In regard to cases of this kind, it may be observed, that where the immediate cause of death is no more than remotely and fortui-

nerally appear about half an hour after it has been swallowed; occasionally in a shorter time; but they are very rarely delayed beyond an hour. In the case of Mary Elder, (1827,) for poisoning her servant-maid, the symptoms of poisoning did not decidedly begin till more than eight hours after the only occasion on which the prisoner appeared to have administered any thing to the deceased in a suspicious manner. This circumstance contributed materially to her acquittal.—Chris. Pois. 215-16.—Ed. Med. and Surg. Journ. xxvii.—On dissecting the body of a person poisoned by arsenic, in general the appearances are as follows:—The stomach more or less inflamed; in some instances, dusky redness appears on it in patches, interspersed with points and streaks of a brighter colour. The villous, or innermost coat of the stomach, is almost always softened, and can be easily rubbed off in pieces with the fingers from the coats beneath. Where death is late in taking place, extensive ulceration of all the coats may be expected. The intestines are always more or less inflamed, and the fundament is sometimes ulcerated. Where the arsenic has been swallowed *in substance*, it will often be found attached to the membrane of the stomach by a peculiar glairy fluid. Where it has been taken *in solution*, though the same organic injuries will be discovered, the presence of the arsenic itself in the stomach can scarcely be expected.—2 Paris and Fonb. 225.—Arsenic kills when applied to a fresh wound, or introduced into the rectum, or vagina; and probably it may also be fatal when applied to the unbroken skin. It may be added, that it appears to have the power of retarding and modifying the progress of putrefaction in the bodies of persons poisoned by it.—Chris. Pois. 209-254.

Vitriol, or Oil of Vitriol, (*Sulphuric Acid.*)—This fluid is generally of a brownish tinge; it is without smell, and of an oily consistence, whence its popular name. Its taste is highly acid and caustic, producing in the mouth a painful feeling of heat. The smallest fatal dose on record is one drachm. It was taken by a stout young man, and killed him in seven days. A man has recovered after taking six drachms.—Chris. Pois. 125.—The ordinary duration of poisoning by sulphuric acid is between half a day and two or three days.—The symptoms of this poison are an extremely austere, acid, and burning sensation in the mouth and throat, excruciating pain in the stomach; nausea, and excessive vomiting; at one time the fluid vomited is black, at another, reddened with blood, producing in its passage through the throat the most intense pain, and a powerful sensation of bitterness; if a portion of it should fall on any calcareous substance, it will denote its true nature by effervescence; constipation, or sometimes bloody discharges; excruciating pains over the abdomen, with a tenderness in these regions so exquisite as not to allow the slightest pressure without torment; difficulty of breathing; frequent and irregular pulse; great restlessness and agitation, and convulsive motions of the countenance. The intellectual powers generally remain uninjured to the last.—On dissection, the stomach will, in general, exhibit extensive disorganization; though this will depend, in some measure, on the state of its alimentary contents at the time. The mucous membrane of the mouth, tongue, and gullet, will, in most cases, be found destroyed, and converted into a pulp. The presence of vitriol in the stomach, even when complicated with alimentary matter, is easily detected.—2 Paris and Fonb. 302.

Aqua Fortis (*Nitric Acid*) produces nearly the same symptoms and organic appearances as sulphuric acid, though its operation is, in general, more rapid and violent.—2 Paris and Fonb. 305.

tously connected with the violence, the pannel ought to be acquitted. Thus, if the sufferer recovers from the wound after a long confinement, which induces a consumption that ultimately proves fatal, the injury cannot be regarded as the cause of death.[1] In the case of Campbell, (1819,) the sufferer, who had been wounded in the leg, was not considered

Opium is extensively used in medicine, and also as a luxury, especially by the lower orders in large towns. The lowest fatal dose has not been distinctly ascertained, but death has occurred from 36 grains, and the like result has been caused by little more than half an ounce of the tincture. Professor Christison observes, that it is next to certain that a less quantity will prove fatal, though he has met with no distinct case of death from less in an adult.—Chris. Pois. 535.—Opium is of a reddish brown colour, and has a peculiar heavy and narcotic odour; its taste is acrid, bitter, and hot. It has been frequently administered with porter, to which, in its properties, it has some resemblance.—The symptoms of this poison are giddiness; insensibility; respiration low and disturbed; power of motion lost; pupils insensible to the impression of light; muscles of the limbs and trunk in a state of extreme relaxation. In a short time the countenance becomes ghastly, the pulse small and imperceptible, and death ensues. The stupor produced by opium is distinguishable from that caused by apoplexy or epilepsy, as the person poisoned can be roused by agitation, tickling the nostrils, or the like. The length of time between taking the poison and the commencement of its effects varies from a few minutes to an hour, or even five hours. The ordinary duration of a fatal case of poisoning with opium is from seven to twelve hours.—Chris. Pois. 534.—The appearances on dissection are not to be relied on; but the poison will often be met with in the contents of the alimentary canal, and in such quantities as will leave no doubt as to its nature.—2 Paris and Fonb. 394.—This, however, is not always the case, as the poison, though swallowed in considerable quantities, may disappear by absorption or decomposition in the course of a very few hours.—Chris. Pois. 543.—One of the most satisfactory modes of identifying it is afforded by its powerful and highly characteristic odour.—2 Paris and Fonb. 394.

Prussic Acid (*Hydrocyanic Acid*) is procured from certain vegetables, such as bitter almonds, the leaves of laurel, and peach blossoms; and in odour it strongly resembles those substances. It is the most fatal and powerful of all poisons. When the dose is large, it occasions death in a few minutes, and without convulsions; when taken in smaller quantity, the respiration becomes slow, the pulse fails, and vomiting and convulsions take place. The morbid appearances after death are equivocal; but the strong and peculiar odour yielded by the corpse will furnish a satisfactory proof of the presence of this poison. To add force to the evidence, it is advisable that several persons should perceive the odour.—2 Paris and Fonb. 396-409.—The suddenness of the operation of this poison was a subject of inquiry in the English case of Freeman, (1829,) tried for poisoning a girl who was pregnant by him. The girl was found dead in bed, obviously poisoned with prussic acid. The body was stretched out in a composed posture, with the arms crossed over the breast, and the bed-clothes pulled smoothly up to the chin, and at her right side lay a small narrow-necked phial, from which apparently about five drachms of prussic acid had been taken, and which was corked, and wrapped in paper. There naturally arose a question, whether the deceased, after drinking the poison out of such a vessel, could, before becoming insensible, have had time to cork the phial, wrap it up, and adjust the bed-clothes; and upon this point the evidence of several medical persons was given on the trial, the import of which was, that the supposed acts of volition, though within the bounds of possibility, were, in the highest degree, improbable. Professor Christison, who relates the case, remarks, that "Some one must either have been present at the

[1] 1 Hume, 182.—Burnett, 550.

in any danger. He was, however, unfortunately put into a bed in the Infirmary, which had been occupied by a person ill of erysipelas, and he took that disorder, and died in consequence. The prisoner was acquitted.[1] In the case of MacMillan, (1827,) charged with murder and assault, a quantity of sulphuric acid had been thrown in the face of the deceased, which produced such inflammation, that bleeding in the arm was resorted to. The orifice made to let the blood flow inflamed, and of this he died, but not from the injury in the face. The pannel was convicted of assault only.[2]—In like manner, if the sufferer, by obstinacy or intemperance, has aggravated the injury into a mortal sore, he is himself answerable for the fatal result.[3] Thus, in the case of Paterson, (1823,) tried for murder and assault, it appeared that the deceased, some days after receiving the wound, drank a quantity of whisky, and, on being carried to the Infirmary, was seized with erysipelas, which proved mortal. The prisoner was found guilty of assault only.[4]—The same judgment is given, where the wound has been rendered mortal by rash and improper applications. Thus, in the case of MacEwan, (1830,) it appeared that the injury, which was a dislocation of the arm, had been treated by an ignorant bone-setter, whose operations did more harm than good, and that, in consequence of the inflammation *thus occasioned* acting upon a sickly habit of body, a white swelling ensued, which proved fatal. The prisoner was acquitted.[5] On the other hand, however, it is to be observed, that the mere *absence* of proper or skilful treatment will not relieve the pannel; as, for instance, where an assault is made which opens an artery, it will be no defence to plead that, by the assistance of a surgeon, the wound might have been staunched, and life preserved. In such a case, the injury has had its natural course and issue, and nothing has been *done* by the sufferer to increase its mortal tendency. The pannel is therefore answerable for the consequences which have ensued.[6] Thus, in the case of Mackenzie, (1827,) it appeared that the pannel seized the deceased by the throat, and bruised him severely in several parts of his body, in consequence of which,

time the deceased took the poison, or have arranged the body soon after death. For if she had time to cork and wrap up the phial, the case must have been of that slower description which is attended with convulsions, so that the body would have been in a discomposed attitude; and if the case was of the sudden kind, where convulsions do not occur, she could not have corked and wrapped up the phial, and also adjusted the bedclothes."—Chris. Pois. 565.—The prisoner was acquitted.

[1] Alison, 147. [2] Syme, 288. [3] 1 Hume, 182.
[4] Alison, 147. [5] Id. 150. [6] 1 Hume, 184.

lock-jaw supervened, and he died. Skilful medical advice was not called in till near the end of the illness, when the lock-jaw was already come on, and in the interval he had acted somewhat imprudently, and aggravated the symptoms. The medical evidence, however, clearly proved, that *the lock-jaw was owing to the injury, and was a frequent result of it.* The Court was unanimous that the homicide was proved, and the prisoner was found guilty.[1]—It is of no consequence that a considerable interval of time has elapsed between the infliction of the injury and death, provided the patient continually languishes under the wound, and becomes worse and worse, by gradual progression, till death ensues. In the case of Lowis, (1610,) an interval of *seventeen months* had taken place; but the Court, notwithstanding, held the case to be proper for the consideration of a jury.[2]

3. In proving the cause of death, it sometimes happens, that considerable doubt arises from the supposition that the deceased may have committed *suicide.* In such cases, the appearance of the injuries is always very material. In general, a suicide inflicts wounds on the abdomen, chest, and face, and almost always in an oblique direction, from right to left; those made by an assassin are often on the back part of the body, and when in front, are generally from left to right.[3] The state of the hands, whether wounded or not, the appearance of the clothes, the indications of robbery, the posture of the body, the situation of surrounding objects, and the previous history of the individual, are all of importance. Indeed, the most minute and trifling circumstances ought to be attended to, as these often furnish conclusive proofs of guilt; their apparent insignificance exempts them from the usual precautions with which the assassin seeks to veil his crime. A woman was found in bed with her throat cut, and a knife sticking in the floor near her; three of her relations were in an adjoining room, through which it was necessary to pass in order to reach the apartment of the deceased. These relations declared that she must have destroyed herself; but, from a particular circumstance, they were suspected, and found guilty of the murder; for on the *left* hand of the corpse was observed the bloody mark of a

[1] Syme, 158. [2] 1 Hume, 185.

[3] In the case of Divan, it appeared that the murderer came *behind* his victim, and in that position cut her throat with a razor. The wound, therefore, had the same appearance as if it had been inflicted by the hand of the deceased herself.—Fodéré observes, that the expression of the physiognomy of a suicide is more tranquil than that of the victim of homicide. —Suicide is very rarely committed before puberty; generally from the age of 20 to 50, and rarely after that period.

left hand, which, of course, could not be that of the deceased.[1] In the year 1764, a citizen of Liege was found shot, and his own pistol was discovered lying near him, from which circumstance it was concluded that he had destroyed himself; but, on examining the ball by which he had been killed, it was found to be too large ever to have entered that pistol; in consequence of which, suspicion fell upon the real murderers.[2] In the case of Divan, (1824,) the deceased, who was the pannel's wife, was found in bed with her throat cut. There was a pool of blood on the middle of the floor at some distance from the bed, and a bloody razor on the mantel-piece. A shift, completely saturated with blood, was found rolled up, and concealed behind some pieces of wood. It was proved by the medical witnesses, that the wound was of such a kind as must have instantaneously deprived the deceased of the power of loco-motion, so that it was impossible that she herself could have deposited the razor on the mantel-piece, or rolled up and concealed the shift. The evidence of the prisoner's guilt was of the most conclusive kind, and he was accordingly convicted.[3] In a case mentioned by Paris and Fonblanque, where a person was found hanging in a garret, the supposition of suicide was removed by the circumstance of a handkerchief being found drawn over the face of the deceased, and his hands tied behind his back, in such a way as shewed that it could not have been done by himself. The murderers were convicted.[4] The marks of footsteps near the body, and the indications of a struggle having taken place, are always important. In the case of Thornton for the murder of Mary Ashford, (1817,) evidence was given as to the footsteps of a man and woman, which shewed that the persons had been running, and dodging each other.[5] In the case of Mr. Taylor, who was murdered at Hornsey in December, 1818, marks of footsteps, deep in the ground, were discovered near the river in which the body was lying. The hands of the corpse were found clenched, and contained grass apparently torn from the bank.[6] In the case of Archibald Maclennan, (1830,) the pannel was indicted for the murder of his wife, by strangling her on the sea-shore, and throwing her over a rock into the ocean. It appeared that the body of the deceased, who was a maniac, was found on the shore with marks of violence on the throat and head. On

1 Hargrave's State Trials, Vol. 10.—Appen. p. 29.
2 3 Paris and Fonb. 39.
3 Unreported.
4 3 Paris and Fonb. 44.
5 Trial of A. Thornton.
6 3 Paris and Fonb. 41.

the morning of the day on which the body was found, the pannel, after inquiring for his wife, was seen to follow her towards the sea-shore, and in the direction of the place where the body was afterwards found. At the top of a rock, near this place, were discovered the marks of a desperate struggle; the track of something heavy having been drawn for some yards over the grass to the very edge of the rock was quite evident, and the tufts of *bent*, and the projecting eminences, on this line, were torn up, as if caught hold of by some creature when endeavouring to resist the violence, and save itself from being pushed over. Fragments of the bed-gown and handkerchief which the deceased wore that morning were found lying close to the marks. The foot-prints corresponded with those of the pannel and deceased, the former being with, and the latter without, shoes. The pannel was found with his shoes wet, which was likely to have happened in pushing the body into the water. It appeared that the pannel had often previously used the deceased in a cruel manner. The Court considered the evidence sufficient, but the jury thought proper to find the libel not proven.[1]—In cases of poisoning, considerable difficulty is sometimes found in negativing the supposition of suicide. The noted case of Mary Elder, (1827,) furnishes an instance of this. She was indicted for the murder of a servant-maid, in her house, by means of arsenic. The deceased was with child to the pannel's son, and the pannel had repeatedly given her drinks, apparently for the purpose of procuring abortion. One night she gave her something in a glass which left a white sediment, and on the following morning the deceased was taken ill with the usual symptoms of arsenic. She died three days afterwards in great agony. The deceased used expressions indicating that some poisonous matter had been given her by her mistress. The pannel had bought arsenic, five days before the death, stating it was for rats. There were no rats about the place at the time, and it did not appear that any arsenic had been laid for rats. The pannel at first denied that she had bought arsenic, but afterwards she admitted the fact, and stated that she had laid it for the rats, in presence of the deceased. Arsenic was discovered in the stomach of the deceased, but no traces of that poison were found in her repositories. On the other hand, it appeared that the deceased was subject to occasional depression of spirits, and, on these occasions, had let fall expressions of an

[1] Alison, 82.

intention to destroy herself. In particular, two or three weeks before her death, she had expressed herself in serious terms to an old beggar-woman, in regard to her unfortunate situation from being pregnant, and her wish to commit suicide. The jury found the libel not proven; but this verdict did not meet with the approbation of the Court.[1]

Nature of Wound in reference to special Plea.—In closing this subject, it may be remarked, that where the pannel admits the homicide, but pleads that it was casual, or justifiable, the nature and appearance of the injuries may often be of material importance in estimating the value of the defence. In the case of Annesley, for shooting a poacher, the defence was, that the gun had gone off accidentally, on the prisoner attempting to secure the deceased. The prisoner was acquitted, on the evidence of the surgeon, who had examined the wound, and who stated, that its direction, being upwards, very satisfactorily proved that the fowling-piece had not been levelled from the shoulder, which would have implied design, but must have been discharged at the trail, and, therefore, by accident.[2] In the case of Mr. Campbell of Boreland, (1831,) it appeared that the deceased having come to the pannel's house at night, desiring to get in, the pannel went out with a double-barrelled gun, upon which the deceased retired, and soon after both barrels went off, and killed the man at the distance of twenty yards. The pannel alleged, that he stumbled on the ground, which was proved to be rough and slippery, and the gun went off by accident; and this was confirmed by the shot slanting upwards in the body of the deceased. The pannel was acquitted.[3] In the case of Watt, (*circa* 1780,) tried for the murder of his nephew, by stabbing him, on the public road near the village of Shettleston, the statement of the accused was, that the deceased (who was an extravagant and dissolute young man) had stopped him on the road, and importuned him for money; that on his refusing to give him any, a violent scuffle took place between them, in the course of which the pannel was brought to the ground, with the deceased above him, and that, in that situation, and to save himself, the pannel inflicted the wound. There were no witnesses present on

[1] Syme, 92.—See before, p. 91, *note.*

[2] Hargrave's State Trials, Vol. 9. p. 327.

[3] Alison, 142.—Dr. Paris observes, that the appearance of a gun-shot wound does not always furnish satisfactory evidence of the direction in which the shot was fired; as balls are capable of being deflected from their course by a very slight resistance. He mentions the case of a man who was struck on the breast by a ball, while standing erect in the ranks, and the ball was found lodged in the scrotum.—2 Paris and Fonb. 124-6.

the occasion, and the deceased died immediately. The statement of the pannel, however, was confirmed by the medical witnesses, who deponed that the wound, from its nature and appearance, must have been given *from below*. The prisoner was acquitted.[1] The keeper of a house of bad fame in Greenock was indicted (1819) for the murder of a sailor, by shooting him through the chest. It appeared from the evidence of the medical witnesses, that the auricles and part of the aorta next the heart were shattered to atoms by the slugs and brass nails with which the piece was charged, and, in their opinion, he must have dropped down dead the moment he received the shot; therefore, as the body was found in the street, and the door of the house was 18 feet up an entry, it followed that the prisoner must have run after him into the street, and there shot him. On the part of the prisoner, it was stated and proved, that he had shot him through the door of his own house, which he was attempting to enter by force; and besides direct evidence to this effect, it appeared that there was a stream of blood from the door of the house to the spot where the body was found, which could not have run from the body towards the house, as the threshold of the door was on a higher level than the pavement of the street. The jury, by a unanimous verdict, acquitted the prisoner.[2]

SECTION III.

ATTEMPT AT MURDER.

ATTEMPT at murder may be considered in reference either to the common law, or to statute.

1. *Attempt at Murder at Common Law.*—This crime is held to be committed where the injury inflicted is of such a kind as shews an utter recklessness on the part of the pannel for the life of the sufferer; as where a man is wounded in the chest with a sword or pistol, or poison is administered to him in his food.[3] Thus, in the case of Kean, (1825,) the pannel, who had fired a pistol at the sufferer, within a few yards of his body, was convicted of attempt to murder, although he contended, that the pistol being loaded with swan-shot, instead of ball, indicated an intention to maim only, and not destroy.[4]—The crime is also committed although no injury has ensued, provided the pannel has done all that he

1 Unreported.
2 Beck's Med. Juris. by Dunlop, 334.
3 1 Hume, 26.
4 Alison, 164.

could to accomplish his purpose; as, for example, where the pistol misses fire, or the ball does not hit its object, or the knife breaks short on a button.[1] And the same thing is true, though the act be of a more remote kind, provided it be one by which the pannel meant, and expected, to destroy life, and which, unless providentially defeated, would have had this result.[2] Thus, in the case of Ramage, (1825,) it was held sufficient that the pannel had put poison into the tea-pot of the intended victim, which she found standing by the fire-place of the latter, and left it there, in order that it might be used by her at breakfast.[3] In the case of Dingwall, (1818,) it was found sufficient that the pannel had attempted to seduce a surgeon into a conspiracy to poison his wife, by furnishing him with doses of arsenic to be administered to her as medicines.[4] It would seem that the law does not take cognizance of the remote preparations for murder; as, for instance, the purchase of the poison, or the loading of the pistol, as, in such cases, the deed is still *in the pannel's own hands*, and he may desist without proceeding farther.[5]—Where the situation of the parties, at the time of inflicting the injury, was such, that if the wounded man had died, the killing would have amounted only to justifiable or culpable homicide; the pannel is, of course, entitled to the benefit of the same extenuating circumstances, in judging of the charge of attempt. The same rules will, therefore, be followed in this department which have been already explained in treating of homicide.—Attempt at murder is punishable, at common law, with any pain short of death. In cases of great atrocity, scourging and transportation for life have been inflicted.

2. *Attempt at Murder under the Statute.*—By statute,[6] attempt to murder, *or* to do severe bodily injury, is raised to the rank of a *capital* offence, in the following cases. (1.) Where loaded fire-arms are discharged against any person, or attempted to be discharged. It is not necessary, in this case, to prove the intention to kill, or injure; the intention is *inferred* from the act of using the arms. (2.) The stabbing or cutting of any person, with intent to murder, or to do severe bodily injury. In this case, the intent must be proved in the same way as at common law; and it must farther appear, that the stabbing or cutting have actually taken

1 1 Hume, 27.

2 Ibid.—The act, in order to constitute a cognisable *attempt*, must be "*malefício proximum*;" an inception or inchoate act of execution.—1 Hume, 27.

3 1 Hume, 28. 4 Id. 27. 5 Id. 28. 6 10th Geo. IV. c. 38.

effect on the person aimed at. (3.) Where poison is administered, with intent to murder, or to do severe bodily injury. Here also the intent must be proved in the ordinary way, and it must appear, moreover, that the poison has been actually swallowed, and not merely put in the way of the intended victim. (4.) An attempt to suffocate, strangle, or drown, when made with the design of destroying life, or of doing serious bodily injury. In this case, likewise, the intent must be proved; and it must farther be shewn, that the violence employed had for its object to suffocate, strangle, or drown. (5.) Where sulphuric acid, or other corrosive substance, is thrown at a person with intent to murder, disfigure, or do serious bodily harm, and where the person aimed at has been disfigured, or seriously injured, in consequence. In this case, besides proving the intent, and that the acid has reached the person aimed at, it must be farther shewn, that serious personal injury has been thereby produced. The mere throwing of the acid, therefore, or its burning or destroying the dress, will not be sufficient.—In any of these cases, where circumstances appear on the trial which would have lowered the crime from the rank of murder, had death followed, the effect is not to render the statute inapplicable, but merely to modify the punishment which it sanctions into one of an inferior kind. It may be added likewise, that the prosecuter has the power of restricting the pains of law, without departing from the statute.[1]

SECTION IV.

CONCEALMENT OF PREGNANCY.

It is enacted by statute,[2] that, if a woman "shall conceal her being with child during the whole period of her pregnancy, and shall not call for, or make use of, help or assistance in the birth, and if the child shall be found dead or be amissing, she shall be imprisoned for a period not exceeding two years." This statute has been substituted in room of an older enactment,[3] which authorised and required a conviction of murder, on proof of the facts just mentioned, without any other evidence of guilt. By the existing statute, these facts are not considered as presumptions of murder, but as being *in themselves* a crime—a species of culpable homi-

[1] No person has yet been executed in Scotland for attempt to murder.
[2] 49th Geo. III. c. 14. [3] 1690, c. 21.

cide, implying the death of the child through criminal neglect of its safety at the birth.

In a charge upon this statute, the fundamental circumstances to be proved are, that the woman has been pregnant, and that the child is missing, or that the dead body of a child has been found, which is proved to be hers.[1] Where the child is missing, the *pregnancy* can only be proved by symptoms of recent delivery appearing on the woman's person.[2] In the case of the body being found, that evidence may be confirmed by the woman's acknowledgment, before witnesses, that the child is hers. Such a confession has always, of itself, been held a sufficient proof of the pregnancy.[3]—In regard to the *concealment*, the prosecutor is not bound to *prove* this fact; it is sufficient for him to allege it, and, like any other negative, the proposition that the pannel *did not reveal* her pregnancy proves itself, and it lies with her to shew, by contrary evidence, that she did reveal it.[4] But it will be a sufficient defence, if it appear that she revealed her condition to any one individual, and, probably, even though that individual were the father of the child.[5] It is sufficient, though the disclosure has been procured in some measure by constraint, as, for instance, on examination before a justice of peace, or a kirk-session.[6] And farther, it would rather appear that the same must hold, though the disclosure be in some degree doubtful, or expressed in ambiguous terms;[7] and though it rest only on such an implied disclosure as may be gathered from openly providing child-bed linens.[8] Lastly, the concealment must continue down to the death of the child; for if the mother keep and acknowledge her child, after the birth, for however short a period, the statute is not applicable.[9]—Another requisite is, that the pannel has not called for *assistance* in the birth; and on this

[1] 1 Hume, 293.

[2] It is only during the first ten or twelve days after parturition that a satisfactory opinion can be formed, by examination of the person, as to delivery having taken place.—1 Paris and Fonb. 292.—The capability for exertion evinced by women in the inferior ranks, shortly after child-birth, is remarkable, and might appear incredible to many unacquainted with the fact. It is not unusual to find women engaged in reaping, retire to a little distance, effect their delivery by themselves, return to their fellow-labourers, and go on with their work during the remainder of the day. Such a fact occurred in the case of Jean Smith, Ayr, Spring 1824. In the case of Ann Macdougal, (Aberdeen, 1823,) it appeared that the pannel, who was sleeping in bed with two other servants, rose, was delivered, and returned to bed, without any of them being conscious of what had occurred. Instances have even happened in which women have walked six and eight miles, on the day of their delivery, without any sensible inconvenience.—Alison, 161.

[3] 1 Hume, 293. [4] Id. 294. [5] Id. 295. [6] Id. 296.
[7] Ibid. [8] Burnett, 572. [9] 1 Hume, 296.

point, also, the prosecutor is not required to lead proof, the negative that she did not call for aid proving itself, unless elided by contrary proof. If the pains of child-birth come on unexpectedly, and the pannel send for assistance, but it arrives too late to save the life of the child, she ought to be acquitted.[1]—It is not necessary for the prosecutor to *prove* that the child was at full time, and born alive: these facts are *presumed*, and if the pannel allege that the birth was a mere abortion, or that she was overtaken by premature labour, which destroyed the child, it lies with her to prove this; and such a defence is sufficient, because she might have revealed her situation, and called for help at the birth, had it taken place less suddenly, and at the ordinary time.[2] In the case of Aurora M'Leod, (1815,) the pannel confessed the concealment, and failure to call for help, and that she "brought forth the said child *six weeks before the time*, as she believes, and that the child was *still-born*," and the jury found her "guilty *in terms of her own confession.*" This case was certified from the Circuit to the High Court, but no judgment was delivered on it, probably from an impression on the part of the prosecutor, that the case was untenable; and to this lenient construction Baron Hume inclines.[3]

The statute applies indiscriminately to married and unmarried women.[4]—There can be no charge of art and part under the statute; for if any other person than the mother has been privy to the crime, the statute is elided by that very circumstance.

The punishment awarded for this crime is imprisonment, generally from three to six months; but in aggravated cases, and especially where there is reason to believe that violence has been used, it is much longer,—from nine to eighteen months.[5]

Child-murder at Common Law.—Child-murder is tried at common law in the same way as other cases of murder, and, of course, without any reference to the statute. It may be observed, however, that, in general, stronger evidence of *intentional* violence will be required in cases of child-murder than in other cases, because it is established by experience, that in cases of unassisted birth, the mother is sometimes unconsciously the cause of the death of her child. Accordingly, it is a principle of law, that the mere appearances of violence on the child's body are not of themselves sufficient, un-

[1] 1 Hume, 297. [2] Ibid. [3] Id. 298.
[4] Ibid. [5] Alison, 162.

less they are of such a kind as to indicate intentional murder, or unless some other circumstances exist to shew that they were designedly inflicted. In the case of Catharine Butler, (1829,) it appeared that, a few days after her delivery, the pannel set out with her child to walk home, a distance of some miles. She reached home, without her child, and on being questioned, she gave false and contradictory accounts regarding it. At length she stated, that it died of cold on the road, and that she had thrown it into a river which she named, and she acknowledged that a child which had been found in that river was hers. On the other hand, it appeared that the pannel had been kind to her child before setting out, and that it was a cold day when she was on the road, and that the infant might easily have perished of cold on its mother's back. In these circumstances, there were the highest grounds of suspicion against the pannel; but on the principle that there was no decisive evidence that the death was not owing to natural causes, Lord Mackenzie directed an acquittal.[1] In the case of Isabella Shaw, (Dumfries, September, 1830,) it appeared that the body of a female infant, about ten days old, was found in the river Nith, which the pannel at first denied to be the body of her child, but afterwards acknowledged. She stated that she had accidentally smothered the child, by overlaying it, and that, to avoid the risk of suspicion, she had thrown the body into the Nith. The medical witnesses stated, that, in their opinion, death might have occurred from smothering, or even from natural causes, previous to immersion, as there were no marks of violence on the body, and no water was found in the stomach or lungs. The jury found the libel not proven.[2]

The death of a child by mere *exposure* is murder, if it is done in a place where the child must be inevitably destroyed, as, for instance, within flood-mark on the sea shore.[3] Where the child dies by accident, if it be an accident *connected* with the exposure, as by being trodden under foot by cattle, or rode over by a carriage, the crime seems to be no less than culpable homicide.[4]—The exposure of an infant, though death does not follow, is an indictable offence, and has repeatedly been punished with imprisonment.

[1] Alison, 160. [2] Unreported. [3] 1 Hume, 299. [4] Ibid.

SECTION V.

ASSAULT.

THIS crime is of various degrees of atrocity, according to the violence employed, and the degree of injury inflicted on the sufferer. It is not, however, essential to assault, that the person aimed at has actually suffered violence; it is sufficient if such was intended, and that he has incurred alarm and apprehension on that account. Thus, the shooting at, or thrusting with a sword, constitute the crime, though the pistol miss its aim, or the sword do not reach the person.[1] Farther, the same will hold, if blows be struck with the fist at the person, though they fall short, and do not take effect; or even if a gun be levelled, although it be not primed, or the trigger drawn.[2]—With regard to the defence of *provocation*, it is settled that no *words*, however reproachful and contumelious, have the effect of *justifying* an assault.[3] Such provocation, however, will, in general, tend to mitigate the punishment, especially if the assault has not been excessive; but this is a matter for the Court to consider, and not for the jury.[4] Though words will not justify an assault, *blows* will have this effect; a person, who is assailed by blows, is entitled to defend himself, and if the assailant is injured in the struggle, he has himself to blame for the consequence.[5]—But even when justified in retaliating, the pannel must not carry his resentment such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted, or by using a powerful or lethal weapon against a weaker, or, in general, by pushing his advantage, in point of strength or weapons, to the uttermost. In such cases, the defence degenerates into an aggression, and the original assailant is entitled to demand punishment for the *new assault* committed on him, after his original attack had been duly chastised.[6]—But, further, the provocation will not justify the pannel, unless it took place *recently* before the assault. If sufficient time has elapsed to allow the pannel's anger to cool, the deed will be held to savour less of passion, and human infirmity, than of enmity and revenge—a disposition which the law, in all cases, strongly reprobates.[7] It is, accordingly, the invariable

1 1 Hume, 329.
2 Case of Hog, 1831.—Alison, 175.
3 1 Hume, 333.
4 Id. 334.
5 Ibid.
6 Id. 335.
7 Id. 336.

course of the Court, to exclude from proof, on the one hand, any allegations of provocation which is not so recent as to have occasioned allowable resentment in the pannel's mind, at the time of the assault; and, on the other, to prevent the prosecutor from proving any indications of violence on the pannel's part, for any considerable time before the commission of the crime. Thus, in the case of Ross, (1823,) it was offered to be proved, on the pannel's part, that he had sustained material injury from the person assaulted for some days before the crime was committed: but this was stopped by the Lord Justice-Clerk Boyle, as tending to establish the motive of revenge, and so injure rather than benefit his defence.[1] But this rule is not to be followed so strictly as to exclude the consideration of every thing which has occurred prior to the assault; a certain latitude in this respect must be allowed; and it is sufficient if the pannel is in excusable heat of blood when he strikes, though the provocation has not been received at the very hour.[2] Thus, in the case of Lockhart, (1746,) to extenuate an assault made in the evening, the pannel was allowed to prove provocation given him in the morning of the same day, the parties not having again met in the course of the day; but no plea of this kind can be carried farther than such a latitude.[3] In the case of Thomas Menzies, (28th March, 1825,) for assaulting William Auld, the provocation founded on consisted of a public declaration made by Auld that the pannel's father was a liar. This declaration was made the day before the assault, but did not seem to have been known to the pannel till next day about five o'clock, and the assault took place on the same evening about ten. The pannel and Auld had not met during the interval.[4]

In cases of assault, even of the most atrocious kind, the practice is to make a charge simply of assault, and to state the serious parts of the offence as *aggravations* of the simple crime. In this way, the inconvenience is avoided of having the whole charge endangered by a failure to prove part of the aggravations; because the assault and the aggravations being thus charged separately, the pannel may be found guilty of the former, though the latter may be found not proved.[5]—The highest aggravation of assault is, where it is made with intent to murder; an offence which has been already considered, both at common law, and under the statute.[6] But although the intention may not have been to kill, the assault

[1] Alison, 779.
[2] I Hume, 336.
[3] Ibid.
[4] Unreported.
[5] I Hume, 16.
[6] See before, p. 98.

is still an aggravated crime, if it has been done to the effusion of blood, or the danger of life—the latter quality generally resting upon medical testimony,—or if it has been done with loaded fire-arms, or with other lethal weapons, such as bludgeons, hammers, axes, knives, bottles, pokers, tongs, large stones, or any heavy or cutting instrument.[1]—It is also a very serious aggravation of assault, that it has been done with intent to ravish. To prove such intent, there must have been evident preparations for carnal connexion on the part of the pannel—and not merely indecent liberties.[2] It is material, in such a case, if blows and actual injury have been received by the female, for these necessarily infer resistance on her part; and, for a like reason, it is important if she appears to have struggled, and cried out, *before* being discovered by witnesses, and not merely afterwards.[3] The guilt is, of course, much increased, where the assault is made on a child under puberty, that is, under twelve years of age. In such a case, if the child has been induced to permit the attempt, it would seem that the offence loses its character of assault, and will fall to be charged as attempt to commit rape—or the using of indecent practices.[4]—Intent to rob is also a very serious aggravation of assault. It is proved, generally, by such violence as indicates a design of taking the property, as, for instance, putting the hand in the pocket, or snatching at the watch. But juries should be cautious in finding this serious aggravation proved solely upon such grounds; for, it may often happen, in the confusion of an assault, that acts of this kind may take place, without any

[1] Where the charge is laid upon the statute, 10th Geo. IV. c. 38, the mere use of loaded fire-arms *implies* the intent to kill; but, in the case of cutting and stabbing, that intent must be proved in the same way as at common law.—It has been held in England, that the analogous statute, called Lord Ellenborough's Act, applies, if cutting has been inflicted, though the instrument used was not properly adapted for that purpose, as, for instance, the claw-end of a hammer.—1 Russell, 597.—See before, p. 99.

[2] Alison, 185.

[3] Id. 187.—See below, "Evidence in Rape."—In the case of Duncan M'Millan, (9th January, 1833,) the charge was "assault, with intention to ravish, *especially when intoxicating or stupifying drugs, or other substances, are administered*, for the purpose of more easily accomplishing the said intention." The prisoner was found guilty, and sentenced to transportation for life.—Unreported.

[4] In the case of John M'Arthur, (Glasgow, 8th September, 1830,) the charge was assault, with intent to commit rape, and the libel set forth, that the child on whom the crime was committed had been induced, by gifts and promises, to comply with the pannel's desires, and no allegation of violence was made.—In these circumstances, it was objected, on the part of the prisoner, that the fact set forth did not support the charge of *assault*, in as much as assault could not exist without violence.—The case was certified to the High Court, and, after debate, the Lord Advocate abandoned the libel.—Unreported.

intention to carry off the property. Evidence, however, of this description, when joined with any indications of a *previous* intention to commit depredation, will almost always be sufficient.[1]—Assault is aggravated, when committed in pursuance of an intent to compel a rise of wages, or deter from working at a certain rate; or of a combination entered into for these purposes; and such a charge may be laid either on the common law, or on statute 6th Geo. IV. c. 129.—Simple combination, to procure a rise of wages, is no longer an indictable offence, the law upon this subject, both statute and common, having been repealed by 6th Geo. IV. c. 129.[2]—Assault is likewise aggravated, when committed on a magistrate, either when in the execution of his duty, or in revenge for its discharge. And the same thing is true in regard to any other officers of the law, as, for instance, excise and sheriff officers.[3] Assault is aggravated, by being committed by a child on its parent, by a husband on his wife, or by any person upon another within the house of the latter. Assault is also aggravated, like every other crime, by a previous conviction for the same offence.

Mutilation of the limbs, as it is an irreparable injury, is, undoubtedly, one of the worst kinds of assault. It may be charged either as an aggravation of the simple crime of assault, or as a separate offence.—Where any bodily injury inflicted is of such a kind as cannot be announced by a single phrase, it is sufficient if the libel give an intelligible description of it. The terms *Stellionate*, and *Real Injury*, are generally used to designate such offences.[4]

The punishment of assault varies, according to the degree of guilt, from imprisonment for a month, or even a shorter period, to transportation for life. In cases of great cruelty, scourging has been frequently superadded.

[1] Alison, 188.
[2] 1 Hume, 329.—Alison, 188.
[3] 1 Hume, 329.
[4] 1 Hume, 328.—Using threats of death to any person, and attempting, or pretending to carry them into execution, in order to compel a confession of a real or supposed crime, is an indictable offence. The same is true in regard to violence and oppression, more especially, when committed by persons in authority, or entrusted with legal power. In the case of Waddell and others, (1829,) the pannels, who were messengers, had seized a person under colour of legal diligence, carried him, with much violence, to a lock-up house, and stripped and searched his person, all in order to extort money. Sentence of imprisonment and transportation was pronounced.—Alison, 633.—Forcibly carrying off, or detaining a delegate authorised to vote at the election of a member of parliament, is an offence at common law, and has been punished with imprisonment and whipping.—Case of Lindsay and others, 1791.—Id. 642.

SECTION VI.

HAMESUCKEN.

HAMESUCKEN is the felonious seeking and invasion of a person in his dwelling-house.[1]—The distinctive characteristic of this crime, is the violation of the security of a person's *home*, in which, as in a place of privacy and retirement, the occupier is entitled to consider himself in safety. It cannot, therefore, be committed on a tradesman in his booth, shop, or warehouse; on a miller in his mill; on a banker in his counting-house, or the like. The same thing is true, though the shop or warehouse be a part of the dwelling-house; for still it is a place of common access, and not intended to be private.[2] As little is it hamesucken, if the assault have taken place, not in the party's proper home, but under the roof of a stranger, or in an inn, hotel, or place of temporary residence. It is, however, immaterial though the house be not the party's own property, if he holds it as tenant or possessor; and this protection is not confined to the master of the family only, but extends to his wife, children, and servants, and, in general, to all the members of his household, who are there at bed and board permanently at the time.[3] In the case of an innkeeper, there is room for a distinction. If a person, already in the inn as a customer, invade the landlord, though in such a way as shews he came there for no other purpose, this is not hamesucken, but only an aggravated assault. But if the entry be made, not in the usual manner, but violently and unlawfully, as by forcing a window in the night, the same protection applies to the innkeeper as to any other individual.[4]—Hamesucken is not committed any where but *within* the dwelling-house. An assault, therefore, made in the precincts of the house, or in the court-yard or offices, is not hamesucken, but only a common assault. But, on the other hand, the crime is hamesucken, if the injury be inflicted within the house, in pursuance of a design to commit violence there, although the assailants have neither crossed the threshold, nor in any way entered the house, as by firing at the inmate from without, or thrusting at him through an opening.[5] The same thing seems to be true, though the chief personal injury has been done without, if the man was within the

[1] 1 Hume, 312. [2] Id. 313. [3] Id. 314.
[4] Id. 315. [5] Id. 315-16.

house when the assault commenced; as if the invaders, on the master opening to them, rush upon him, and pull him into the highway, and there beat him with sticks.[1] The same will hold, if the invaders break into the house, and the master leap from a window, to escape from the violence, and they follow, overtake, and wound him.[2] It is not hamesucken if the sufferer be enticed by artifice to quit his house, and is then beaten, as, for instance, if he is drawn out upon a fictitious errand.[3]—It is not material in what manner the house has been entered, whether by force, fraud, or in any other way; provided the entry has been made *with the design* of committing personal violence. It is this premeditated *seeking* of the person at his home that constitutes the essence of the crime.[4] No outrage, therefore, however violent, which a person suffers in his own house, is hamesucken, if it happen in consequence of a quarrel taken up at the moment, even though there had been a previous grudge between the parties, if the invaders came there peaceably and lawfully at first. The same will hold if the entry of the house has taken place in consequence of a scuffle in the street, and the assailant has merely followed the person assaulted into his own house, whither he has fled for refuge; for this happens from heat of blood, which is not so criminal as deliberate revenge.[5] Farther, it is not hamesucken, if the entry, though felonious, have taken place with an intent to commit a crime of *stealth*, and not of *violence*, as, for instance, fire-raising; and the violence has ensued in consequence of the offender being detected, and in the course of the efforts made to apprehend him. As little is it hamesucken, if the house has been entered under some mistaken idea of right, as under an irregular warrant, or by mistake for some other person, and in consequence violence ensues; or where excessive and irregular execution has been resorted to under a warrant in itself correct and lawful.[6]—In regard to the nature of the injury suffered, it must not only be personal, but of a grievous and material kind, and not merely such a slight injury as savours more of contumely than actual injury. Thus, in the case of Haldane, (1718,) it was held not to be hamesucken that the master of a house was caught by the throat, had a cane shaken over his head, and was raised from his bed in the night-time by a party of armed men, who

[1] 1 Hume, 315-16. [2] Id. 317. [3] Ibid.
[4] The term *Hamesucken* is derived from two German words, *heim* home, and *suchen* to seek.—Jamieson's Dictionary.
[5] 1 Hume, 319. [6] Ibid.

forced him into the street.[1] But provided the injury be of the due rank and degree, it signifies nothing of what description it be in other respects. Thus it is hamesucken to give a person a horsewhipping, to beat him with a stick, or with the fist, or to bind and confine him within the house, or to invade a man in his own house, with a view to carry off his property, though the injury to his person be but slight, or to attempt to commit a rape on a woman in her own house, or to carry her off from thence by force, with a view to a rape, or a forcible marriage.[2] The same will hold, though no actual violence be done to the person, if a serious personal injury be attempted, as if a pistol be discharged, though it do not hit; or a thrust be made with a sword, though it be averted, or fall short; or if, by threats of death, and a pistol held to his head, a person is forced to subscribe a bond for money, or the release of a debt that is due to him, because, in such a case, though money, and not personal injury, is the offender's object, yet, as he cannot obtain the one without the other, he is held to intend both.[3]

In regard to the form of charge in cases of hamesucken, it may be mentioned, that the usual practice is to libel, in addition to the charge of hamesucken, an alternative charge of assault, aggravated by being committed on a man in his own house, of which latter crime the pannel may be convicted, if the evidence do not support an entry with the design of using violence.—The punishment of hamesucken in aggravated cases of injury is death: in cases of inferior atrocity, an arbitrary punishment.

SECTION VII.

RAPE.

RAPE is the carnal knowledge of a woman's person, forcibly and against her will. It is essential to this crime, that the act of connexion be fully consummated;[4] and the proof

[1] 1 Hume, 320. [2] Id. 320-1.

[3] 1 Hume, 321.—Violent invasion of personal freedom, and of the security of private houses, though not amounting to hamesucken, is an indictable offence. In the case of Watson and others, (1826,) it appeared that a smuggler having been wounded by a revenue officer, the latter was imprisoned, and bail refused till the wounded man should be out of danger. The pannels thereupon entered his house without any legal authority, took him out of bed, undid his bandages, and examined the wound, in order to make a report to the Sheriff that he was out of danger. This act was held to be an indictable offence.—Alison, 684.

[4] 1 Hume, 301.—Burnett, 101.

of this will depend chiefly upon the deposition of the woman herself.—Though the violation must be accomplished by force, yet it does not alter the crime, if the woman only discontinue her resistance out of fear of death, as when a pistol is held to her head, or a dagger to her breast; or if she be threatened with destruction, and so beaten and abused, as to alarm her for her life; or if she faint in the struggle; or if, from natural infirmity, she is incapable of making any effectual resistance.[1] The same would seem to hold where the woman has been stupified by drugs,[2] if she did not previously give any indications of consent.[3] In the case of females below the age of puberty, (viz. twelve years of age,) a constructive force exists sufficient to infer rape, though no actual violence has been offered, because a girl of those tender years, being incapable either of the desire or discretion which must combine to have a will in the matter, the deed may be justly held to be against her will, even when she makes no resistance.[4] Cases of this kind are always regarded as peculiarly aggravated.—The situation and character of the woman do not affect the nature of the crime, as the law looks not to the person who suffers, but to the act itself which it prohibits.[5] Thus, a rape may be committed on a common prostitute. In such a case, there is no doubt a presumption of the woman's assent, which will require to be overcome by very clear proof of violence having been used; but if this proof is obtained, the pannel ought to be convicted. No doubt, the same injury is not suffered by the prostitute as by the woman of entire fame; but this is a circumstance for the Royal mercy to take into consideration, and it cannot affect the determination of the jury.[6]—It is equally rape, if the woman's person be violated against her will, whether it be done for the sake of lust, or of ambition, or any other malignant passion.[7]—In regard to art and part of this crime, it is settled that all those who assist in subduing the sufferer, or who are present at the time, and approve of the deed, are equally guilty as the principal actor.[8]

Besides the Lord Advocate and the party injured, the kinsmen and near relatives of the woman are entitled to prosecute for this crime. The punishment is in all cases death.[9]

Evidence in Rape.

In cases of rape, the principal evidence generally consists of the testimony of the injured female; it is indispensable,

1 1 Hume, 303.
2 Ibid.
3 Alison, 213.
4 1 Hume, 303.
5 Burnett, 103.
6 1 Hume, 305.
7 Ibid.
8 Ibid.
9 Id. 306-7.

therefore, to consider minutely the credibility of her story, and the support which it derives from the other parts of the evidence. The circumstance which renders this examination more necessary in rape than in almost any other offence, is, that the facts attending it bear so close an affinity to voluntary connexion, that it is easy for a woman who has fallen into an illicit connexion, for the preservation of her character, or to extort money, to contrive a story, which, in every other particular but the violence said to have been used, may be not only strictly true, but completely supported by the other circumstances of the case. It is not sufficient, therefore, to support the evidence of the woman by proof, that the parties were seen together about the time, in the most suspicious circumstances, for all that may be true, and yet the connexion may have been voluntary. The principal point to attend to is, whether her statement, in regard to the *violence* used, is duly corroborated, and this is done in the best manner by the signs of injury appearing on the woman's person, the testimonies of those who heard her cries for help, and evidence in regard to her subsequent disclosure of the crime to her relations, or the public authorities.[1] The usual physical appearances consequent on rape are by no means decisive of the charge, because they are produced equally by voluntary and involuntary connexion. Thus, the rupture of the hymen, inflammation of the vagina, &c. are as usual after the one species of connexion, where it occurs for the first time, as the other. More important evidence is to be found in appearances of violence on the other parts of the woman's person, as marks of blows, symptoms of having been thrown violently down, marks of grasping by the throat, and such like; for whatever may be said of the other, it is certain that *these* appearances have not been produced with her concurrence. The *place* where the crime is alleged to have been committed is one of the most important indices in the inquiry as to the want of consent on the woman's part. If the assault took place on the roadside, or in a situation not such as is usually selected for illicit intercourse, it affords a presumption that her story is well founded, and that she was the victim of sudden and reckless passion. On the other hand, if there be any appearance of the parties having retired to a more sequestered situation, as by going off the road into a field, or a wood, or a shed, or of her having gone out of her way with the pannel, previous to the alleged offence,

[1] Alison, 220.

or the like, it affords such an obstacle in the way of conviction, as in the general case will prove insurmountable.[1] In regard to the fact of *cries* having been heard, a distinction must be observed. If the woman was aware that she had been discovered or caught in the act, her cries cannot be relied on, because they may have been, and frequently are, uttered to give a colour of violence to a voluntary proceeding; if they took place *before* any discovery to her knowledge had been made, and alarmed persons at a distance, they are the strongest evidence of resistance. Any undue delay on the part of the woman in communicating the outrage, at least to her more confidential relations, will always form a serious objection to her testimony. At the same time, however, it is to be remembered that women, especially of tender years, have frequently an insurmountable aversion to communicate such an outrage. It will be for the jury, therefore, in considering the situation and whole circumstances of the witness, to judge of the motive from which the delay has proceeded.[2] False statements given by the pannel in regard to his intercourse with the woman, as, for instance, a denial of his having been in her company at the time of the alleged violence, will not in general be regarded as very important against him, as they might naturally occur though the connexion had been voluntary. It will, however, bear a different construction, if the pannel, after the commission of the alleged crime, quitted the company of the woman and fled. It may be remarked, also, that sometimes the external appearance of the parties—their comparative age and bodily strength—may afford grounds for judging of the credibility of the woman's story.—In general, the falsehood of the woman's evidence may be elicited by a well-conducted cross-examination, directed to such minute circumstances, as were not likely to have been considered by her previous to the trial; and her veracity may be still farther tested by proof, as to her having previously given different accounts of the transaction shortly after it took place, provided she be first cross-examined herself in regard to these contradictory statements.[3] But farther, it is competent to examine the woman, and also to adduce evidence in regard to her previous character and conduct, as these are circumstances which must often affect the weight of her testimony. Thus, it may be proved that the woman was a common prostitute, or that she had before been criminally con-

[1] Alison, 221. [2] Id. 222-3.
[3] 1 Hume, 309.—2. 409.—See before, p. 31.

nected with the prisoner.[1] It may be added, however, that the pannel must give warning in his defences, of his intention to impeach the woman's character.[2]

Indecent Practices.—Besides the charge of rape, and the subordinate offence of assault with intent to ravish, the law of Scotland takes cognizance of those infamous and unnatural practices, by which the morals of female pupils are debased and corrupted, before they have attained sufficient intelligence to defend themselves from such pollution. This crime has been repeatedly punished with transportation for seven years.[3]

Forcible Abduction.—The only other offence which peculiarly concerns the female sex, is that of forcible abduction and marriage. It was formerly doubted, whether this crime was not capital, but it is now settled, that it only warrants an arbitrary punishment. In the case of Gray, (1751,) for the forcible abduction and marriage of an heiress of fifteen years of age, the pannel and two accomplices were transported for fourteen years.[4]

SECTION VIII.

THEFT.

THEFT is the felonious taking, and carrying away, of the property of another, for the sake of gain.[5]

1. The fundamental quality of the crime is the *taking*; which implies, that the thing was previously in the possession of the owner, or of some one for him, out of which, the thief, without the consent of the owner, has removed it. This offence, therefore, differs from the various species of fraud and swindling, for in these the proprietor consents to transfer the property of the article, though there has been fraud in inducing him to do so; and from breach of trust, for, in this latter case, the culprit is in possession of the goods, and with a power of management and disposal.[6] Thus, for instance, it is not theft, that an insolvent person represents himself as in good circumstances, and thus obtains credit for goods for which he cannot pay, and with which he runs off;[7] or that a person, who has got a subject in pledge, converts

[1] 1 Hume, 304. [2] Ibid. [3] Id. 309. [4] Ibid.
[5] 1 Hume, 57. [6] Id. 57-8. [7] Id. 57.

it to his own use;[1] or that a person, who has honestly borrowed or hired a subject, afterwards appropriates it;[2] or that a factor runs off with the rent which he has been employed to uplift;[3] or that a steward, entrusted with the management of a farm, converts the price of the crop to his own use;[4] or that a cashier of a bank, or a collector of taxes, appropriates the money entrusted to him;[5] or that a servant sells his livery-clothes while in place, or goes off with them upon him, when he leaves the place.[6] In like manner, it is not theft, if a person, who has found a parcel on the highway, and discovers whose it is, detains, and appropriates it to himself.[7] On the other hand, it is theft, though the owner has, to a certain extent, put his property into the offender's power, if he still means to retain it under his own personal care; as, for instance, if a person deliver a portmanteau to a porter, to be carried, in his own presence, to a certain coach, and, at the first turning, the porter runs off with it;[8] or, if a shopkeeper put goods into the hands of one who asks for such articles to purchase, and this person immediately run off with them.[9] It is also theft, if the custodier of a thing, for a limited purpose, appropriate it; as, for instance, a butler his master's plate, or a shepherd the sheep; as the possession is held to be still in the master, the servant being a mere hand through whom the thing is held.[10] And the same rule applies in the case of an apprentice or shop-servant, abstracting any part of the goods contained in the shop, though he is entrusted with the power of selling them for an adequate price.[11] Of course, the same thing must hold where the custody is given merely for the purpose of having the goods subjected to an occasional and particular operation; as where a tailor appropriates the cloth which he is employed to make into a suit of clothes.[12] Or an *occasional*[13] carrier converts to his own use the goods committed to his charge;[14] or a banker's clerk runs off with a sum of money which he is sent with to pay instantly at a certain house;[15] or a runner of the post-office takes money from a letter which is put into

[1] 1 Hume, 59. [2] Id. 58. [3] Id. 60.
[4] Ibid. [5] Id. 61. [6] Id. 60.
[7] Id. 62. [8] Id. 63. [9] Ibid.
[10] Id. 64. [11] Burnett, 112. [12] 1 Hume, 67.

[13] Baron Hume, (Vol. 1. p. 58,) delivers a contrary doctrine, in regard to a *regular and established* carrier; but this point has not yet been decided by the Court.

[14] Alison, 253.—Shaw, 220.

[15] 1 Hume, 65.—In the case of Stewart, (Perth, April, 1830,) the libel set forth, that the pannel having been entrusted with a bank deposit-receipt for £210, to get payment of the £200 and interest, and bring back a

his hands, to be delivered according to the address.[1]—It is theft if a person appropriate an article of which he has obtained the *possession* only, and *not the property*, having made use of false representations to obtain the possession, and having an intention at the time to convert the thing to his own use. Thus it is theft if a man hires a horse professedly to go a particular journey, but, instead of doing so, he instantly rides as hard as he can in a different direction, and there sells the animal for his own behoof;[2] or if a person gets linen on a false pretence of being a bleacher, and immediately, upon obtaining it, packs it up, and flies, or sells it, and pockets the price.[3] The distinction between such cases, and those in which the *property* of the thing is obtained on a false pretence, lies here,—that, in the one set of cases, the owner has consented to transfer the *property*, therefore, he has only been imposed upon to the extent of inducing that consent; in the other, he has never agreed to part with the *property*, but with the possession or custody only, and, therefore, the offender's appropriation is a taking without the owner's consent, or theft. In like manner, such cases may be distinguished from those of appropriation on a contract of loan, for, in the latter cases, the offender has, by a *lawful taking*, got the full possession, and the abuse of that possession afterwards cannot amount to theft; whereas, in the former, the just construction is, that the owner's possession remains unaltered, notwithstanding the delivery, proceeding on the receiver's felonious purpose, and the subsequent appropriation is, therefore, a *wrongful taking*, or theft.[4] Accordingly, in the case of Smith, (1829,) the charge was that the pannel hired a horse from a stabler in Edinburgh, to ride about the town for two days, but, instead of doing so, he directly rode off to Glasgow, where he sold him for his own behoof. The libel charged theft alternatively with fraud, but the Court held that the case was one of theft; and that the proper *locus* of the theft, in such a case, is the place where the horse was first obtained by the pannel with the design of abstracting it.[5]

new receipt for £200, and having received the sum of £24 at the bank, and a new receipt, he appropriated the said sum and receipt to himself. This was held to be theft. The libel charged theft and breach of trust alternatively.—Unreported.

[1] 1 Hume, 65.

[2] In the case of William Barr, (Glasgow, May, 1832,) the pannel was charged with theft, in respect that he had obtained possession of a horse, saddle and bridle, upon hire or in loan from a certain person, on the false representation that his (the pannel's) father was dangerously ill, and that he was going to visit him—the pannel having thereafter sold or attempted to sell the said horse, &c., for his own behoof. This was held to be a relevant charge.—Unreported.

[3] 1 Hume, 68. [4] Id. 68-9. [5] Alison, 269.

2. But besides a taking, there must also be a *carrying away*. The thing must be removed from its place and state of keeping, otherwise, however clear the felonious purpose, the act does not amount to theft, but to an attempt only to commit that crime.[1] Thus, if a boy put his hand into a man's pocket, and get hold of his purse, but is stopped before taking it out; or if a person having got into a waggon to steal, raise a package on its end, but is caught before removing it from its place, the act is not theft.[2] On the other hand, however, the crime is completed though the thing has not been removed entirely out of the sight or knowledge of the owner. Thus, though the thief is seen in the very act of taking the thing, and is instantly pursued, and throws it down, the offence is nevertheless theft.[3] Farther, it is theft in every instance where the thing is taken out of its proper place of keeping, under such circumstances as clearly indicate the intention of the taker. On this principle, the crime is completed as soon as the horse is carried out of the stable, or the cattle out of the enclosure in which they were kept.[4] It is theft where any thing which has a peculiar and safe place of keeping within a house is removed from that situation, though not carried out of the house; as where money is taken from a desk, china from a cupboard, books from a book-press, or linens from a chest. Thus, in the case of Macdonald, (1823,) it was held that goods were sufficiently removed to constitute theft, which had been taken out of various open places of deposit in a cottage, and placed on the thief's handkerchief in the middle of the floor, but without the handkerchief having been tied, or any farther removal effected.[5] In the case of Thomson and Brown, (1823,) it was held to be sufficient that bed-clothes were taken from a bed, and rolled up in the same room, without farther removal.[6] On the other hand, however, in the case of Boyle, (1826,) where the thief had rolled the bed-clothes to the bottom of the bed, evidently with a view to removal, but was scared before he had proceeded farther, the theft was held not to be completed.[7] In the case of M'Ewan, (1826,) it was held that the removal was not sufficient where a shirt was rolled up, but not taken out of the drawers where it had been placed; but that it would have been otherwise if the article had been taken out of the drawers, though it had been thrown instantly down on the floor.[8] In general, if

[1] 1 Hume, 70.—Attempt to steal is an indictable offence.
[2] 1 Hume, 70. [3] Ibid. [4] Id. 71.
[5] Alison, 269. [6] Id. 268. [7] Id. 269. [8] Ibid.

the state of fixture in which the thing naturally is be altered, or the particular provisions made for its safe custody overcome, this, joined with the least removal in respect of place, completes the crime. Thus, if a strong chest which is fastened to the floor be unscrewed, and removed, though ever so little, from its place, the act of theft is completed.[1] The same principle applies to the stealing of such things as are usually kept in a certain manner on the person; thus it is theft if the purse is taken out of the pocket, or the watch drawn from the fob, or the ear-ring torn from the ear, though the articles be instantly recovered.[2] With respect to articles for which no particular provision of safe-keeping has been made, any removal will be sufficient that thoroughly alters the situation in which the thing happened to be at the time, and is a plain step in the conveyance of it out of the owner's power; as if any loose article is moved from a higher floor of a house to a lower, or if a horse is taken in an open common, and is haltered and ridden away, though but a few yards, from among the other cattle.[3]

3. The taking and carrying away must be with a *felonious purpose;* that is, a purpose to appropriate a thing known to the taker at the time to be the property of another. Thus it is not theft if the taker's intention, though irregular and improper, was not to appropriate the thing; as if a farmer, finding his neighbour's plough lying in the field, uses it in tilling his own ground; or if he drive his neighbour's cattle into his own pasture in the night, to poind them there under pretence of a trespass.[4] Nor is it theft, though the taker mean to appropriate the thing, if he seriously and excusably, though erroneously, believes it to be his own. Thus, in the case of Ker, (1792,) it appeared that the pannel, conceiving himself entitled to certain of his deceased father's effects, and having demanded them from his elder brother and been refused, came in the night and clandestinely carried them off; this was found not to be theft, though a highly culpable act.[5] The crime, however, will be theft if the pannel's belief of his right to the goods is directly in the face of law, and grounded only on his own violent passions or singular ideas, as where a smuggler breaks into a custom-house and takes away goods which have been seized from him and condemned.[6] If the taker believed, on rational grounds, that the owner would not object to his taking the goods, the crime will not be theft. This presumed consent may be inferred

[1] 1 Hume, 72. [2] Ibid. [3] Ibid. [4] Ibid.
[5] Burnett, 118. [6] 1 Hume, 74.

from the relationship, or other intimate connexion of the parties; and when sufficiently pregnant, will obviate the presumption of felonious intent, arising from the way in which the thing was taken.[1]

It is not essential to theft that the taking should be *clandestine*, that is, without the knowledge of the owner or custodier, for theft is committed where a person snatches the hat from a man's head, or his watch out of his hand.[2] The secret nature of the act may, however, occasionally assist in proving the felonious purpose of the taker.

4. It is farther indispensable that the thing be taken *for the sake of gain*. But by gain, in this case, is understood any advantage or satisfaction which the thief may expect from the possession of the subject.[3] In general, this quality of the crime is inferred from the removal of the thing, for the culprit must believe that the thing will be in some way useful or satisfactory to him, otherwise he would not remove it.[4] It is of no consequence that the thing be taken away with the obvious purpose of being destroyed, for, in such a case, the destruction of the thing and the consequent injury of the owner, is the *gain* which the thief had in view.[5] But where the thing is destroyed, without being removed, the crime is not theft, but an offence which is prosecuted under the name of *malicious mischief*; as, for instance, where a man's cattle are slaughtered and left dead on the field; or a mob enter a house, and break the furniture.[6]—It need hardly be added, that theft is committed of any article, however trifling, and though it be of no value to any one but the owner.

5. The last requisite of theft is, that the thing taken be the *property of another*. Though a person taking his own property may in certain circumstances be guilty of a wrong, as, for instance, where it is pledged, yet his offence cannot amount to theft.[7] It is not necessary to shew whose property the thing is; it is sufficient that it is not the property of the culprit, and that it was not lying unoccupied at the time, but was in a state of natural and lawful custody for behoof of the person having right to it.[8] If the pannel was the owner of the thing, or held authority from the owner to take it, he is, of course, entitled to prove this; and he could do no more to exculpate himself, though the thing were alleged to belong to a particular individual. Accordingly, it

1 Burnett, 120. 2 1 Hume, 77. 3 Id. 75. 4 Id. 76.
5 1 Hume, 76. 6 See below, "Malicious Mischief"
7 1 Hume, 77. 8 Id. 78.

is matter of ordinary practice to describe the stolen goods as being the property of the person from whom they were stolen, or "of some other person *to the prosecutor unknown.*"—It is immaterial whether the thing stolen belongs to a private person, or to a corporation, or parish, or any other public body.[1]

Theft may be committed of every thing that can be carried away, though it be part of an immovable subject. Thus, grass may be cut and stolen from a field, coals from a pit, fuel from a moss, and lead from the roof of a house. It may be committed of all tame animals, but not of wild animals, unless they be under the power of another, for instance, deer in a pen, rabbits in a house;[2] and by statute it is made theft to carry off deer from a park, fish from a pond, rabbits from a warren, pigeons from a pigeon-house,[3] and bees *in a hive*;[4] though this last is undoubtedly a theft at common law, and as such is treated in modern practice.[5] The most atrocious theft of this description is that of an infant child—the *crimen plagii* of the Roman law.[6]—The raising of a dead body from the grave is not theft, but an offence known by the name of *crimen violati sepulchri*, to be afterwards treated of. But it is theft to take a dead body, *before* interment, from the custody of the relatives.[7]

It is scarcely necessary to state, that the guilt of theft is not affected by repayment of the value to the injured party, or even by an early and spontaneous restitution of the property carried away.[8]

Theft by Housebreaking.—The most aggravated species of theft is that which is committed by *housebreaking*. This offence has always been regarded with great severity by our law, as it implies much daring and deliberation on the part of the offender, and great peril to the lives of innocent persons. To constitute housebreaking, it is not necessary that any actual *breaking* or *forcing open* of the house have taken place; it is sufficient that its natural security have been overcome. Thus, it is housebreaking if the thief come down the chimney, or enter by a sewer, or make his way into a mill by the water-wheel.[9] The same is true if he enter by a window, though without the removal of any bolt or other fastening,[10] and even though the window has been left a few in-

[1] 1 Hume, 78. [2] Id. 81-2. [3] 1474, c. 60; 1535, c. 13; 1587, c. 59.
[4] 1535, c. 13; 1555, c. 58. [5] 1 Hume, 82.
[6] It seems doubtful whether it is theft if the child is enticed away, and *consents* to go; it is clearly, however, an indictable offence.—Alison, 630.
[7] 1 Hume, 85. [8] Id. 79. [9] Id. 99. [10] Id. 100.

ches open, if he pushes it farther up, and so obtains entrance.[1] Nay, the same will hold though the window has been left sufficiently open for his entrance, provided it is at such a distance from the ground as to render external assistance necessary to reach it. But the contrary will hold where a window, left sufficiently open for entrance, is so near the ground, that a person may step in from the outside, without climbing, for, in such a case, the owner is to blame for leaving his property in such a state;[2] and the same is true, even though the thief, in order to reach a window in the situation just described, has to climb over an iron railing in front of the house; this was laid down by the Court in the case of Cameron, 12th July, 1832.[3] It is housebreaking where the entry is made by forcing open the door, by using false keys or picklocks, or in any way putting aside the bolt, or by means of the true key previously stolen, or fraudulently obtained,[4] as by taking it out of a hole or hiding-place, where it had been secreted, which is frequently the case with the labouring classes when they leave the house to go to their work. It is also housebreaking to enter by means of the true key left in the lock.[5] This was laid down by Lord Justice-Clerk Boyle, in the case of Vallance, 1825.[6] It is not housebreaking if the door be merely closed, or standing shut by the latch, if by moving the handle on the outside it can be opened. But it is housebreaking if the door have no means of opening from the outside, and the latch is burst open by pressure from without.[7] In the case of Devin and others, (Glasgow, September, 1829,) it appeared that the door had been fastened by means of a bolt, which was inside, and which opened and shut by passing the finger or a nail through a hole in the door; and in this manner the thieves entered. Lord Justice-Clerk Boyle, and Lord Moncreiff, held this to be housebreaking.[8] It is housebreaking though the entry be made by cutting through the wall, the floor, or the roof, and that whether from an adjoining tenement or not.—Where the entry is effected by concert, or connivance with a servant or other person within, the crime is housebreaking in all concerned.[9] The same holds, if a thief knock at a door in the night, and when it is opened, rushes in; or if a party surround a house, and the owner opens the door to drive them off, and they overpower him and enter;[10] *stouthrief* seems, however, the

1 Case of Dick and Jeffrey, 1829.—Alison, 283.
2 1 Hume, 98.
3 Unreported.
4 1 Hume, 99.
5 Burnett, 136.
6 Alison, 285.
7 1 Hume, 98.—Burnett, 136.
8 Unreported.
9 1 Hume, 101.
10 Id. 100.

more appropriate designation for offences of this kind. It is housebreaking, if one, being lawfully in a house, takes the opportunity of throwing up the sash of a window, and afterwards returns and obtains entrance in that way.[1] But it is not housebreaking if one enters by stealth, commits a theft, and then breaks *out* of the house;[2] or if one being lawfully in the house, as, for instance, a guest at an inn, breaks into an adjoining chamber;[3] but this, of course, is not true, where the thief has not been lodged in the house, but in a barn or other out-house.[4]—The entry is sufficient, if it enables the thief to seize and remove something placed within, though he may not have entered the house with his whole person. Thus, it is sufficient if he lift the sash, and put in his arm, and carry off any article within his reach.[5] Perhaps it is even sufficient, though no part of his body have entered, that he has merely thrust in a pole or hook, and carried off something.[6]—Like most other crimes, housebreaking may be committed, not only by those who are immediately engaged in the act, but by those who are *art and part*, or accessory to it. Thus, if one breaks into a house, and another keeps watch without, and receives the goods, they are both guilty of the housebreaking.[7] This was held by Lord Mackenzie in the case of Prior and Maclachlan, (1830,) where the only evidence against Maclachlan was, that he had been in possession of part of the stolen goods, and had had meetings with the other prisoner previous to the housebreaking.[8]—Every dwelling-house is protected by the law of housebreaking, however mean and fragile, and although uninhabited, or even not thoroughly prepared for habitation.[9] And every edifice is protected by it, though not a dwelling-house, if it be properly a *house*, or a shut and fast building, and not a mere open shed, or temporary place for lumber. Thus, for instance, the law has been held to apply to a public office, a counting-house, a bonded warehouse, a church, a school-room, a manufactory, a stable, a washing-house, a dairy, a coach-house, and a stable-loft.[10] Where a house is occupied in distinct floors by several proprietors or tenants, each floor is a separate house; and where a floor is subdivided among different persons, who inhabit, for instance, one room each, as is often the case among the poor, each room is a separate house, and entitled to protection as such.[11]

1 Burnett, 138. 2 Ibid. 3 Burnett, 138.—1 Hume, 101.
4 1 Hume, 101. 5 Id. 102. 6 Ibid. 7 Ibid.
8 Alison, 290. 9 1 Hume, 103.
10 Ibid.—Alison, 292. 11 Case of Cowie, 1824.—Alison, 293.

Where housebreaking is charged as an *aggravation* of theft, it is, of course, essential that something must have been stolen, as the theft, in such a case, is the foundation on which the housebreaking rests. Housebreaking, with intent to steal, is, however, a separate and indictable offence, though no theft has been committed; and the whole law, already explained with reference to theft by housebreaking, is here applicable, with this difference only, that the intention of depredation has not been carried into effect.[1]

Theft by opening Lockfast Places.—Where a person already in a house breaks into a locked room, cupboard, chest, or other repository, the crime is generally charged as theft, aggravated by opening lockfast places; and when it occurs, as it usually does, in combination with housebreaking, the offence is regarded as of a very serious kind. It is immaterial whether the security of the lockfast place is overcome by actual violence, as by forcing open the lock, staving in the door or lid, or the like, or by picking the lock, or stealing the key, or using false keys. It will not be sufficient, however, if the repository, though shut, is not locked; and probably the same will hold, though it be locked, if the key is left in the lock on the outside. The reverse, however, is true, if the key be found lying in the room on a chair or a table, and is used to open the lock.[2]

Habite and Repute in Theft.—Another very important aggravation of theft is that of the offender being habite and repute a thief; that is, a person who, in the opinion of his neighbours, makes or helps his livelihood by thieving.[3] It is not sufficient that the accused be a doubtful or suspicious person; he must have been commonly held a thief—the *opinion of others* as to his character being the *matter of fact* for the jury to determine.[4] The ordinary and best method of proving this aggravation, in great cities, is by the evidence of police-officers, who keep their eye upon such characters, supported, as it frequently is, by the record of previous convictions for theft. The proof should consist of the testimony of two witnesses, though one witness, perhaps, would be sufficient, if supported by a series of convictions, extending over a course of years. In the case of Davidson, (1824,) it was held not sufficient to stamp a pannel with the character of habite and repute, that the police-officers swore to his having borne that character for *six weeks* prior to the act of theft charged. On the other hand, such a character for *eight or ten months* is held sufficient. Perhaps *six months* may be

[1] 1 Hume, 102. [2] Alison, 266. [3] 1 Hume, 93. [4] Ibid.

stated as the shortest period that has been held to fix the character of habite and repute.[1] Of course, in judging of this matter, it is material to inquire whether the pannel has abandoned his lawful calling, if he ever had any; and whether he has any visible means of subsistence besides depredation. The police-officers frequently say that the prisoner was once well-known to them as a common thief, but that of late years they have lost sight of him; or that he works occasionally, and, at other times, relapses into his habits of stealing. In judging of such cases, the jury will keep in view, on the one hand, that though a man may have been a habitual thief, the stain may be washed out by subsequent and steady good conduct; and on the other, that a man may be not the less a thief because he occasionally works in the intervals of his depredations.[2] In the case of Isobel M'Millan, (Glasgow, January, 1831,) the officers swore that three years before, they had known her to bear the character of a common thief; but that, during the last three years, they knew nothing of her character. Lord Moncreiff stated to the jury, that he held this evidence not to be sufficient; as the habite and repute ought to apply to a period immediately preceding the trial. The prisoner was acquitted.[3]—The testimony of one or more persons as to the honesty of the pannel in particular dealings, is not a sufficient answer to a proof of habite and repute, for it does not follow that even a common thief will be in every instance dishonest.—As habite and repute is merely an aggravation of a specific act charged, it follows that the pannel cannot be convicted of the former, unless the latter is also proved.[4] And notwithstanding a general verdict of not guilty on such a charge, the pannel may be tried immediately afterwards for a different act of theft, charged with the same aggravation.[5]—The charge of habite and repute is peculiar to theft, and is not applicable even to the kindred offences of robbery, and reset of theft.

Previous Conviction in Theft.—Previous conviction forms a legal aggravation of theft, where the conviction is regular in itself, and has proceeded before a competent Court. In the case of Connar and Kennedy, (23d January, 1826,) for theft by housebreaking, certain previous convictions libelled on were abandoned by the Lord Advocate, in consequence of an objection on the part of the pannel, that they had proceeded on evidence not taken on oath.[6] Witnesses must, of course, be adduced to prove that the conviction founded on

[1] Alison, 300.
[2] Ibid.
[3] Unreported.
[4] 1 Hume, 94.
[5] Id. 95.
[6] Unreported.

applies to the pannel. The aggravation of previous conviction is not regarded in so serious a light as that of habite and repute, as the depravity of character is generally not so great in one who occasionally steals and is punished, as in one who has entirely devoted himself to thieving.

Theft is punished, according to the degree of guilt, with imprisonment, transportation, or death. Theft of property to a great value is capital, but it is generally punished with transportation,—this, of course, being done by means of a restriction of the libel. Thus in the case of James Scott, (13th July, 1824,) for stealing 1,500 sovereigns from a vessel in Leith harbour, fourteen years' transportation was awarded.[1] The theft of a single horse, or ox, or of more than one sheep, is capital, but it is, in like manner, usually punished with transportation. Child-stealing is in all cases capital. The same is true of theft by housebreaking; but the lenity of modern practice often mitigates the punishment. Theft by opening lockfast places is almost always punished with transportation, but rarely with death; and the like is true of the aggravation of habite and repute, and previous conviction. The guilt of theft, of course, must vary according as the aggravating circumstances occur singly or in combination. Our judges have, therefore, an equitable discretion of attending to the whole particulars of the case, and proportioning the sentence to the guilt and danger which it exhibits.[2]

Evidence in Theft.

It rarely happens that direct evidence is to be found in cases of theft. Where it does occur, it is generally in cases of pocket-picking and shoplifting, where the injured person himself observed, or was conscious of the depredation, or the bystanders had an opportunity of perceiving what was going forward. In such cases, where only one witness observes the theft, if he is corroborated by circumstances, as, for instance, the sudden flight of the thief from the spot, his being seen to throw away the stolen article, its being found near the line of his flight, his being caught with it in his possession, or near his feet, his being seen to hand it to an associate in his flight, or the like, the measure of evidence is complete.[3]

The usual cases are those where there is no direct evidence, but the fact of the depredation rests on a variety of circumstances inferring the prisoner's guilt. Thus a shop is

[1] Unreported. [2] 1 Hume, 87. [3] Burnett, 555.—Alison, 312.

broken open during the night: early in the morning the prisoner is seen moving along one of the streets in the neighbourhood with a bundle on his back, which proves to be part of the stolen property. In such a case no doubt can exist as to his guilt, unless he shews satisfactorily that he got the goods from some other person, under such circumstances as either exclude his guilt altogether, or reduce it to that of a resetter merely.[1]

Possession of the stolen property recently after the theft is one of the most conclusive circumstances against the pannel, but its weight will, of course, be greater or less according to the relative particulars of the story. If the prisoner has confessed when brought before a magistrate, or in his declaration, or to the persons who apprehended him; if he was seen hastily making off from the place of the theft, or loitering about it, without any visible reason before; if picklocks, or instruments for breaking doors and windows, are found upon him, and the crime was perpetrated by the aid of such instruments; if he had purchased recently before, or was in possession of a key which opens the lock, and the theft was committed by means of false keys; if any part of his dress, or any articles belonging to him, are found in or near the place from which the goods were taken, or within the house broken open; if the marks of his shoes coincide with the marks left by the thieves; if he offer to deliver up part of the goods, or a bribe, to be let off; if he deny that he has the goods, and they are found, with the marks effaced, secreted in his possession, or about his person, or within or near his house, or place of usual haunt; if he have sold part of the goods at inferior prices, or to known resetters of stolen property; certainly any of these articles of presumptive evidence, coupled with recent possession of the stolen goods, unexplained in any satisfactory way, is a sufficient ground for legal conviction.[2] Thus, in the case of Smith and Stevenson, (1806,) the pannels, who were horse-dealers, having been seen, the evening before the horses were stolen, near the place where the theft was committed, and, in the course of a few days, found with them at Newcastle, were found guilty, and had sentence of death.[3] In the case of Gall, (1827,) for cattle-stealing, the prisoner was seen, on the day preceding the theft, within two miles of the place where it was committed, and, on the following morning, was found in possession of the cattle, at a few miles distant; upon this evidence he was convicted.[4] In the case

[1] Alison, 313.
[2] 1 Hume, 112.
[3] 1 Hume, 111.—Alison, 320.
[4] Alison, 321.

of Laidlaw, (1823,) it appeared that the pannel, a few days before the shopbreaking, had purchased a key which opened the door, and he had been frequently before about the shop. Three days afterwards he was found in possession of the stolen goods; he was found guilty.[1] In the case of Connar and Kennedy, (23d January, 1826,) it appeared that, about an hour after the theft, the pannels threw the stolen articles from their window into the street, being alarmed by the approach of the police-officers; and they denied that they had done so, or that they had been in possession of the articles. On this evidence Connar was convicted.[2] In the case of Leechman, (5th July, 1824,) it appeared that a person was assailed in the street by a mob and knocked down, and, on reaching home, he found that his watch was gone. The pannel was in the crowd at the time, and was seized coming out of it with the watch in his hand, but without the seals, and on being searched, the seals, which had been attached to the watch, were also found on his person. He was convicted.[3] In the case of M'Ghie, (21st February, 1825,) the pannel was found in the street at night, almost immediately after the theft, and in the same quarter of the town in which it was committed, with the stolen goods—two webs of duck—on his shoulder. On being questioned, he stated that he was going to the Canal Basin, but afterwards he said he was going to Maitland Street to a Mr. Turnbull at No. 35,—though no such person was found to live in that street, and the highest number was 24. He also gave contradictory accounts as to the way in which he had got possession of the goods. He was convicted.[4]

It frequently happens that the identification of the goods by the owner of them is not complete, as in thefts of money, unmarked goods, and the like, where all that the owner can say is, that the property found on the pannel resembles the goods stolen from him. Where the fact of the prisoner's possession rests upon evidence of this kind, of course stronger additional circumstances will be required for conviction, than where the goods are positively identified. What these circumstances ought to be can never be ascertained by any general rule: A few cases, however, may be mentioned as illustrating the point. In the case of Wales, (1828,) it appeared that a shop had been broken into one night, and about £30 in silver carried off. Next day a good deal of silver was found in the prisoner's possession, comprising an old dollar, corresponding with a coin of the same description

[1] Alison, 316. [2] Unreported. [3] Unreported. [4] Unreported.

which had been carried off, but which, of course, could not be identified. There was found in the ashes of the prisoner's fire the iron heel of a shoe which corresponded in size, form, and number of holes, to the iron of a shoe which was left in the shop broken into. The night of the theft was wet, and the sole of one of the prisoner's stockings was found to be wet and dirty, though he was in bed, and said he had not been out that night. The prisoner was convicted. In the case of M'Kechnie and Tolmie, (1828,) it appeared that a soap-manufactory near Glasgow was broken into, and 120 pounds of brown soap abstracted. On the same night, at eleven o'clock, the prisoners were met by the watchmen near the centre of the city, one of them having 40 pounds of brown soap on his back, and the other his clothes all greased over with the same substance. The prisoners, on seeing the watchmen, attempted to escape, but were seized. The owner declared that the soap was exactly of the same kind, size, and shape, with that abstracted from his manufactory; but, as it had no private mark, it could not be identified more distinctly. One of the prisoners had formerly been a servant about the premises; and both in their declarations declared they got the soap in a public-house from a man whom they did not know. On this evidence they were convicted.[1] A similar result occurred in the case of Young, 1828. It appeared in that case that the shop had been broken open by a person well-acquainted with the premises, and a fierce watch-dog left in the shop had not been heard to make any noise, though he would probably have torn a stranger. The prisoner had been a servant in the shop, and was familiar with the dog, and he was seen in a neighbouring street about an hour before the theft. The property stolen was £10 in silver; and £9. 18s. in silver was found in the prisoner's chest, including a crooked sixpence, which the owner said exactly resembled one that had been taken.[2]

According to ordinary practice, the goods found in the prisoner's possession, and alleged to be stolen, are produced in evidence at the trial, in order to enable the jury to judge with greater certainty whether they correspond with the description given by the owner of his property; and regularly the owner ought to describe the goods he has lost, before the articles produced are put into his hands to be sworn to by him.[3] Where the owner identifies the goods absolutely, he ought to state his reasons of knowledge, such as peculiarities

1 Alison, 322. 2 Id. 323. 3 Burnett, 558.

in the appearance of the goods, private marks, or the like. The identity of webs of cloth, and wearing apparel, is often with difficulty established; and the same is true in regard to many other articles, especially those belonging to ships.[1] But besides proving that the goods produced are the property of the owner, it is necessary to prove also that they are the goods found upon the prisoner; for, unless this be done, there is always room for the defence, that the goods produced never were in the prisoner's possession, and that they may have been improperly brought forward. Evidence of this kind is always secured, in modern practice, by having the articles labelled at the time they are found, and placed in responsible custody till the day of trial.[2] Where the production of the goods at the trial is inconvenient or impossible, as, for instance, in cases of cattle-stealing, or where the articles have been lost, the question of identity must rest on the description given by the owner and witnesses of the property said to have been stolen, and of that found in the prisoner's possession. Of course, in such cases the difficulty of establishing the identity is considerably greater than in those where the property is produced.

It was formerly mentioned, that in cases of circumstantial evidence, one witness to each fact is sufficient, because, in such cases, the facts being connected and linked together, mutually support each other. Thus, if one witness swear to a theft having taken place, a second see the pannel in the vicinity, and a third apprehend him recently after, with the stolen goods in his possession, the proof is undoubtedly complete. In such a case, the fundamental fact of a theft having been committed (the *corpus delicti*, as it is called) is sufficiently proved by the testimony of one witness; and the prisoner's guilt by the testimony of two witnesses, swearing each to a separate fact. In like manner, if the owner of a house swear that he closed his windows at night, that in the morning he found them broken open, and part of his plate stolen, and a watchman depone that he apprehended the prisoner running along the street in a direction from the house early in the morning, with a bundle on his back, which proved to be the stolen plate; here, though there are only two witnesses, one to the *corpus delicti*, and another to the prisoner's guilt, there can be no doubt that the evidence is complete. Accordingly, in the case of Wilson and Cunninghame, (1828,) the pannels were convicted upon evidence of this kind.[3]

[1] Burnett, 558. [2] Id. 559.—2 Hume, 535. [3] Alison, 525.

In cases of theft, the evidence of associates in the crime is frequently of decisive importance against the prisoner. As a test of the veracity of such evidence, the associate ought to be minutely examined as to the circumstances of the alleged crime; and if his testimony coincide, in all the minute particulars, with the account of the appearances of the premises, after the depredation was discovered, it affords a presumption almost irresistible, that the account he gives is true. Where witnesses of this kind evince a desire to screen a particular associate, this ought not to have the effect of discrediting their evidence altogether; it ought rather to add especial weight to what they are constrained to state, against their wishes, by force of minute and long-continued examination. On the other hand, where there appears an undue anxiety to fix the crime, in an especial manner, upon one in preference to the others, such testimony ought to be received with caution; and absolutely rejected, if it either vary from the real evidence of the case, or if there be any grounds for supposing that the witness is influenced by a vindictive or malevolent motive.[1]

In cases of theft, much important evidence is frequently derived from the prisoner's declaration. Guilty persons are usually extremely at a loss to account for their possession of stolen articles. They generally say that they found them on the road; that they got them from a person whom they never saw before, and would not know if they saw again; that they received them from one who put them into their hands, and desired them to carry them for a short distance, and then absconded, and so on. Stories of this kind, it is scarcely necessary to say, are, in general, totally undeserving of credit. In the case of M'Ghie, (21st February, 1825,) for stealing, *inter alia*, two rose-wood desks from a shop-door, the pannel stated that his sister had told him that she had observed several boys hiding something in a particular place, and that, on going to the place, he found the desks. The sister, however, was not called to support this story, though it was admitted that she was thirteen years of age, and therefore capable of being put upon oath. The prisoner was convicted.[2]—Where the pannel's account is rational and consistent, and given voluntarily and with candour, it may often be of importance to his defence, though not supported by evidence; but if, on the other hand, the account, in such circumstances, be either incredible or absurd in itself, or varied at different times, or inconsistent with the other

[1] Alison, 327. [2] Unreported.

evidence of the case, it not only is of no weight in his favour, but a material circumstance against him.—It is also a legitimate ground of inference against a pannel, if he admit in his declaration that he was in connexion with one who has confessed his guilt; and, on the same principle, though the declaration of one pannel is not evidence against another, yet the fact that the testimony of an associate in the crime is confirmed by the declaration of one of the pannels, must be received as a support to that testimony, even in considering the case against the other pannel. This was held in the case of Edgar and Young, 1828.[1] It may be added, that it is not sufficient to convict a prisoner that he has confessed the crime in his declaration, even although there should be the clearest evidence of a theft having taken place. The addition, however, of a slight circumstance would, in such a case, complete the proof.

SECTION IX.

THEFT FROM THE MAIL, AND OTHER POST-OFFICE OFFENCES.

It is a capital crime for any person employed in the public post-office to steal money or any voucher for money from a letter, or to destroy or secrete the letter.[2] It is also felony for such person to secrete or destroy letters, though not containing money, or to advance, or fail to account for, the postage received for them.[3] It is a misdemeanour, punishable by fine and imprisonment, for such person to abstract newspapers, or other printed papers, sent by post.[4] It is an offence at common law for a person employed in the post-office to detain a letter in the course of transmission by post. In the case of Smith, (1827,) it was held to be a good charge of wilful neglect of duty as a letter-carrier that he opened a letter, detained it for fifteen days, and then re-sealed and delivered it; the letter did not contain money.[5] It is also an indictable offence, that a servant of the post-office feloniously opens the mail-bag with intent to steal.[6] Robbery or theft of letters from the post-office, by persons not connected with it, is a capital crime, both at common law and under the statutes.[7] It is also a misdemeanour for any person to detain

[1] Alison, 327-8.
[2] 52d Geo. III. c. 143, sect. 2.
[3] 5th Geo. III. c. 25, sect. 19, and 7th Geo. III. c. 50, sect. 3.
[4] 5th Geo. IV. c. 20, sect. 10.
[5] Syme, 185, 233.
[6] Case of M'Intosh, 1826.—Alison, 348.
[7] 7th Geo. III. c. 50, sect. 2, and 52d Geo. III. c. 143.

letters or mail-bags, in course of conveyance by post, and which have been dropped and found on the highway or elsewhere.[1]

SECTION X.

ROBBERY.

ROBBERY consists in the taking away of the property of another, by means of violence applied to the person. Theft and robbery, therefore, are distinguished from each other in this respect, that in theft the thing is taken secretly, or by surprise, while in robbery it is taken openly, and by overcoming the will of the owner.[2]

The observations which have been made as to the *taking* and *carrying away* in theft, apply also to robbery. Though an assault be made with intent to take, and be on the very point of succeeding; as, for instance, if the person have his purse in his hand to deliver, and let it fall through trepidation, so that it never passes into the hands of the assailant, this is not robbery, but only an attempt to rob.[3] In the case of Holland, (1808,) a chain and seals were broken from the watch in the pocket of the person assaulted, but it was doubtful whether this had been done on the part of the pannel to make himself master of them, or whether it had happened accidentally in the course of a long and severe struggle that took place between the parties. The jury convicted him, therefore, of assault, and *attempt to rob* only, the libel bearing these charges, as well as that of robbery. It was held on the bench, that it would have been robbery if there had been proof that the seals were wilfully torn away by the pannel, though they had been instantly dropt on the ground.[4] —It is a sufficient *taking*, though the owner, being intimidated, have, with his own hand, delivered the article on demand; or though it have fallen to the ground in the struggle, and the robber have picked it up; or though the owner have cast it aside, and the robber observe and lay hold of it. Thus, in the case of Anderson and others, (1791,) it was held to be robbery that the hat of the person assaulted had fallen from his head as he was pulled to the ground, and had then been laid hold of by one of the party.[5] In like manner, it is robbery if a snatch be made at a watch-chain, but the article is firmly fastened, and a struggle ensues, in

1 42d Geo. III. c. 81, sect. 4.
2 1 Hume, 104.—Burnett, 145.
3 1 Hume, 104.
4 Id. 105.
5 Ibid.

which the owner is collared, and his hand held till the watch is torn from the fob.[1]—It is a sufficient taking and carrying away, if the thing has passed into the hands of the assailant, though for ever so short a space, and though he be caught on the spot with the property in his hands, and even though he have immediately returned it to the owner.[2]

It is equally essential to robbery as it is to theft, that the thing be taken with a *felonious purpose*, and for the *sake of gain*.[3] Thus, in the case of Wright, (1788,) it was held not to be robbery that one of the parties, in the course of a drunken squabble, had carried off a pistol belonging to another.[4] In the case of Graham and others, (1824,) it appeared that the pannels had forcibly carried off, from a water-bailie, a fishing-net, which he had the day before seized on the shore of a river, in terms of an act of Parliament. Lord Justice-Clerk Boyle held that this was not robbery, but an inferior offence.[5]—It is robbery if a depredation is committed in the course of an assault, though the assault has originated in a different motive, as, for instance, to commit hamesucken or rape.[6]

In regard to the *violence* essential to robbery, it is not necessary that the party injured have been beaten, or the article wrested from him by force, or even any endeavour used on the part of the sufferer to detain it. It is sufficient that he have been constrained, by reasonable apprehension of instant personal danger, either to allow the article to be quietly taken from him, or even with his own hands to give it.[7] In estimating the reasonableness of the sufferer's apprehension, the whole circumstances must be taken into view;—the words, gestures, and carriage of the assailants; and the age, sex, and situation of the person assaulted. In general, the exhibition of lethal weapons is not necessary, or that the sufferer be put in fear of his life, provided he be under the dread of serious and immediate personal danger.[8] It is not sufficient, therefore, where the danger is merely future, as where a threat is made to burn the person's house, or to carry him to jail, or to bring a capital charge against him, for, against such danger the party has the protection of the law, to which he can resort. The case, however, may be otherwise, if the threat is made in such a way as to shew that, if not attended to, it will be immediately followed by personal violence.[9] But it is not robbery, though a serious

1 1 Hume, 105. 2 Ibid. 3 Id. 108.
4 Ibid. 5 Alison, 238. 6 Burnett, 150.
7 1 Hume, 106. 8 Id. 106.—Burnett, 146. 9 1 Hume, 106.

crime, if the person only promises money at the time, and sends it afterwards, when out of reach of personal violence.[1] —It may be inferred from what has been said, that where the article is taken by a sudden and violent snatch, *but without subduing the will*, the crime is not robbery, but theft. Thus, it is theft if a man's hat is snatched off his head by surprise, or his watch out of his hand while he is carelessly holding it.[2] In the case of Smith, (1828,) the pannel had taken a reticule from a lady by grasping her round the waist, and snatching it out of her hand. The crime was held by Lords Justice-Clerk Boyle and Moncreiff to be theft, and the pannel was convicted accordingly.[3]

Robbery applies, not only to such things as are upon the person of the sufferer, but also to those that are under his care and custody. Thus, it is robbery to take goods by force from a waggon or a ship which is under the charge of any person, or sheep from a flock which a man is driving on the road, or to rifle a house, after subduing or intimidating the inmates.[4]

To concuss another, by force or threats, to subscribe a bill, or a release from debt due by the assailant, is not so properly robbery as a separate offence, which should be charged by a general description of its character.[5]—Where robbery is committed within a dwelling-house, the crime is generally charged under the name of *stouthrief*, a term which was formerly employed in our law to denote every species of forcible theft. This matter, however, is not fixed by any precise rule. Housebreaking often occurs in combination with stouthrief, or robbery in the dwelling-house.

The punishment of robbery is in all cases capital, even where the property taken is extremely trifling in value. Thus, in the case of Higgins and Harold, (1814,) the pannels had sentence of death for robbing two persons of a memorandum-book, and a thread purse containing sixpence.[6]

Evidence in Robbery.

There is no class of cases in which the difficulty of procuring sufficient evidence is more severely felt than in robbery, for crimes of this kind are generally committed in the most lonely and unfrequented spots—often at night, and upon unattended and unwary individuals. The evidence generally consists of the testimony of the person robbed, supported by

[1] 1 Hume, 108.—Burnett, 147. [2] 1 Hume, 106. [3] Alison, 237.
[4] 1 Hume, 106-7. [5] Burnett, 151-2. [6] 1 Hume, 106.

corroborative circumstances sworn to by other witnesses. Where the person robbed identifies the prisoner, and thus furnishes *direct* evidence of the crime, a few confirmatory circumstances will, in general, be sufficient to complete the proof. In the case of Thomas Meldrum, (1826,) for the robbery of Alexander Bowie, it appeared that the pannel and Bowie had been drinking with some others in a village public-house, and that Bowie, on leaving the house, took some silver change from one pocket and put it into another, which the pannel had an opportunity of seeing. When Bowie was at the door, the pannel said aloud, "You'll not take all that silver home to-night;"[1] and he took a stick in his hand, and followed Bowie. It was stated by Bowie, that the pannel came up with him on the road, threw him on his back, and took the silver from his pocket. On this evidence the pannel was convicted.[2] In the case of Douglas, (1823,) the pannel and the person robbed had been seen walking together towards the place where the crime was committed. The person robbed stated, that he had been knocked down by the prisoner, and robbed of his watch; and his appearance, when he came to the nearest house, clearly proved that he had been thrown on his back on the road. The prisoner was afterwards found in possession of the robbed watch. On this evidence he was convicted.[3] In the case of Macfarlane, (1826,) it appeared that the pannel had been drinking at a public-house on the road-side with the person robbed, and that the latter had then a watch upon him, and the pannel had an opportunity of seeing it. They were seen to leave the house together, and the person robbed stated, that, after proceeding a short way, he was robbed of his watch by the pannel, with the assistance of another person, and both got clear off. On reaching the place of his destination, the owner of the watch gave an account of the transaction to a man whom he there roused from his bed, and he then wanted his watch. On this evidence the prisoner was convicted.[4]

Where the injured person is unable to identify the prisoner, this defect will, in general, be sufficiently supplied by the prisoner's recent possession of the robbed articles, supported by a train of circumstances, or by the testimony of an associate in the crime, similarly supported. Thus, in the case of Stevenson, (1825,) it was proved by the person rob-

[1] Many cases have occurred, in which pannels, in the lower ranks of life, have openly avowed their intention to commit robbery, before proceeding to perpetrate the crime.

[2] Unreported. [3] Alison, 242. [4] Id. 244.

bed that he was assaulted on the road by two men, and robbed of his watch; but, from the violence of the blows received, and the darkness of the night, he was unable to identify the prisoner as one of them. A few days afterwards, the prisoner presented the robbed watch to a pawnbroker; and an associate of the prisoner, who turned King's evidence, deponed to him as the person who struck the blows previous to the robbery, and the particulars of this statement were confirmed by the person robbed. The prisoner was found guilty.[1] A similar result ensued in the case of Mackinlay and others, who were tried for breaking open a house belonging to an old woman, and forcibly carrying off her property. The robbers had blacking on their faces, and were so disguised that the woman could not identify them as the prisoners. It appeared, that, on the day of the robbery, the prisoners had set out from a place about eight miles distant, and were traced by successive witnesses to about three-quarters of a mile from the old woman's house; they were likewise traced back to the former place next morning, by a different route, and they were all apprehended there on the same day in one room. A portion of the old woman's property was found in the house where they were seized, and a farther portion of it in a field at a short distance from the road by which they returned. An associate in the crime detailed the whole circumstances as King's evidence, and in these he was corroborated by the other facts of the case. The prisoners were convicted.[2] In the case of Leechman, (5th July, 1824,) charged alternatively with robbery and theft, it appeared that a person passing along the South Bridge of Edinburgh was assailed by a mob, and knocked down by a stroke from behind, and, on reaching home, he found that his watch was gone. The prisoner was in the crowd at the time, and was immediately thereafter seized coming out of it with the watch in his possession, and on being searched, the seals also were found on his person, detached from the watch. He stated that he had found the watch lying on the ground, and that the seals had been separated from it, in consequence of some other persons making a snatch at them, though he was left in possession of both watch and seals. In these circumstances, the charge of robbery was abandoned by the public prosecutor, and the jury convicted of theft.[3]

1 Alison, 243. 2 Id. 248. 3 Unreported.

SECTION XI.

RESET OF THEFT.

RESET of theft is the receiving and keeping of stolen goods, knowing them to be such, and with the felonious intention of retaining them from the owner.[1]

To constitute this crime, the offender must have taken the goods into his possession, but it is not material how short the possession may have been; or whether it was only for the purposes of temporary concealment. To harbour and entertain the thief, he keeping the goods in his own custody, though with the knowledge of the entertainer, does not involve the latter in the guilt of reset; it is otherwise if the goods are committed in any way to the care of the entertainer.[2] In the case of Boyd and others, (1823,) the thieves were apprehended in the house of the resetters, and the stolen goods were found in a bundle lying on the floor; two associates in the theft deponed to the goods having been looked at by the resetters, and to some communing having taken place about their purchase, which, however, was not concluded. The resetters were convicted.[3] In like manner, in the case of Finlay and others, (1826,) it appeared that the thieves came running into the house where the resetters lodged, and hastily threw the stolen goods into a bed, where they were covered up by one of the prisoners, who immediately fled; this person, though only a lodger in the house, was convicted of reset.[4]—It is not material upon what footing the goods are received, whether upon pledge, barter, purchase, (and, if on purchase, whether at a low or a fair price,) or as a deposit only for the thief.[5]—It is immaterial whether the thing be received immediately from the thief, or from a person who has received it from him; it is sufficient that it was found in the pannel's possession, from whatever hand he may have derived it.[6] If, however, the article has been sold to the pannel by the thief at the instigation of the officers of the law, by whom the thief has been apprehended—and as a decoy to the pannel—it is probable that this will not be sufficient. In the case of Alexander Hamilton, (21st January, 1833,) charged with reset, it appeared that the police-officers having apprehended a boy with

[1] 1 Hume, 113. [2] Ibid. [3] Alison, 329. [4] Id. 334.
[5] 1 Hume, 113. [6] Id. 114.

stolen goods in his possession, sent him to offer part of the articles for sale to the pannel, with whom he had been in the habit of dealing in that way. The pannel accordingly purchased the articles, and concealed them in his shop, and immediately afterwards he was taken into custody by the officers. In these circumstances, it was contended for the pannel, that, as the goods, previously to the sale, had come into the possession of the police-officers, who must be held to have possessed them for behoof of the true owner, they had ceased to be stolen goods, and were consequently incapable of being resetted. The Court declined to pronounce any judgment on the point, but they recommended to the prosecutor to abandon the charge. This was accordingly done, and the pannel was assoilzied.[1]—The pannel must *know* that the goods were stolen. Bare suspicion of that fact, or cause of doubt on his part, as to his author having acquired the things unlawfully, is not enough; for the pannel, in that case, might only have been deficient in sagacity or attention.[2] This rule, however, must be understood in a reasonable sense; for it often happens, owing to the caution observed in this kind of traffic, that no express disclosure is made. It is sufficient, therefore, if circumstances are proved, which shew the pannel's understanding that the goods were stolen.[3]—The receiving must be with the felonious intention of retaining the goods from the owner. In general, this intention is proved by the same circumstances of evidence which establish the pannel's knowledge of the theft; and the proof of the latter, therefore, will usually infer the former.[4]—A wife cannot be charged with resetting the goods which her husband has stolen, and brought to their common house;[5] unless it appear that she has taken an active share in the guilt, by selling the stolen articles, or the like. The mere act of concealment will not infer the crime against her; this was held in the case of Mallach, 1828.[6]

The crime of reset is often nearly allied to theft, and may resolve into it, if the reset have taken place soon after the commission of the theft. Thus, the offender is art and part of the theft, if he was in the *previous knowledge* of the intention to commit it; and gave any kind of *previous assistance*; and *received the goods* immediately on their being stolen.[7] This, however, relates exclusively to the case where the pannel has sufficiently fixed the theft on another, and the only ques-

[1] Unreported. [2] 1 Hume, 114. [3] Ibid. [4] Id. 115.
[5] Mackenzie, tit. *Reset.* [6] Alison, 339. [7] 1 Hume, 115.

tion is, whether he was art and part with that other, or a resetter only; if no other thief be pointed out, the possession of the goods infers theft against the pannel, and not reset.[1]

The resetter may be tried before the thief, although the latter be known and in custody; and both offenders may be tried on the same libel.—The punishment of reset varies from a few months' imprisonment to transportation for life; the circumstances by which it is proportioned being generally the value of the articles received, the description of house kept by the pannel, and his own previous character.

Evidence in Reset of Theft.

In all cases of reset, *the theft* of the goods must be proved as set forth in the libel, for this constitutes the foundation of the charge. It is not necessary, however, to shew by whom the theft was committed, for this sometimes cannot be ascertained.[2]—In regard to the pannel's possession, it is not necessary to shew from whom it was acquired; it is enough if the goods are found in his custody, that is, in such a situation as makes it fairly presumable that they were not put there by servants or others, but by himself, or with his connivance.[3] His knowledge of their stolen quality is generally inferred from circumstances; such as the receiving of valuable articles from boys, or persons in indigent circumstances, especially if brought at untimely hours, or under circumstances of concealment; the low price paid for them; the attempt to disguise them by alteration, or effacing of marks; the concealment of them in unusual places, as under beds, in coal-cellars, up chimneys; the denial of them to the officers of justice; and the character of the person from whom they have been obtained, as a notorious thief, or a person from whom stolen goods have been formerly received.[4] The declaration of the prisoner is often of great importance in the proof of this crime, as indicating that state of guilty knowledge in which the offence consists; for instance, where he prevaricates as to the manner in which he obtained or concealed the goods, or claims them as his own property, or that of any of the members of his family.[5]—It is competent to adduce the thief as a witness against the resetter; but such evidence will, of course, be relied on with caution, and only where it is supported by the other evidence of the case.

[1] 1 Hume, 117. [2] Id. 114. [3] Ibid. [4] Ibid. [5] Ibid.

SECTION XII.

PIRACY.

PIRACY is the crime of roving and robbing on the high seas. A pirate differs from a regular enemy in this respect, that he has no commission of hostility from any acknowledged government, but carries on a private and indiscriminate war of his own authority.[1] This crime is cognisable by our courts, though committed by foreigners against foreigners, and in a distant part of the world.[2] It is piracy if a privateer, under the pretence of his commission, plunders the ships of his own or friendly states. It is also piracy whether the ship is taken, or its cargo, or crew; and equally, whether the violence is perpetrated by strangers who invade, or by the mariners on board who seize the vessel.[3] Compulsion exculpates, but not if the person afterwards freely assent, as by accepting a command in the ship, or continuing in the adventure when at liberty to leave it.[4] The punishment of piracy is capital.

Plundering Wrecks.—Plundering wrecks is a cognisable crime, though the owner of the vessel is unknown, and all on board have perished. It is punishable arbitrarily. If any human being remain alive on board the wreck, the offence is theft; and if the goods, in such case, are taken by violence, it is robbery.[5]

SECTION XIII.

BREACH OF TRUST.

THE distinction between breach of trust and theft has been already pointed out.[6] It consists chiefly in the manner in which the goods appropriated came originally into the offender's possession. Thus, the appropriation of goods that have been impledged, or given in loan or for hire for a long period, or where the trust is of such a kind as implies a power of management or disposal, is not theft, but breach of trust;[7] as where a person hires a furnished house for a term, and afterwards disposes of part of the furniture; or a livery-

[1] 1 Hume, 480-1. [2] Ibid. [3] Id. 482. [4] Id. 484.
[5] Id. 485. [6] See before, p. 114. [7] 1 Hume, 58.—Burnett, 141.

servant sells the clothes furnished by his master;[1] or a factor runs off with his employer's rents; or an overseer, or steward, appropriates the grain, or other produce, which has come into his possession in the course of his management.[2] The same principle applies to all who are in a responsible state, as officers, and are entrusted, not with the *custody* only, but the *possession* and *administration* of money, such as cashiers and tellers of banks, collectors of taxes or parochial rates, treasurers of bodies-corporate, judicial factors, and the like;[3] it also applies to the case of a shop-clerk or book-keeper, appropriating money paid to him on his master's account; and to the case of a guard of a mail-coach, or carrier, appropriating money entrusted to him,—not sealed up, but open,—to be delivered at a distance to particular people.[4] If goods are put into a tradesman's hands for the purpose of being repaired, and the operation is of such a kind as necessarily requires considerable time, the subsequent appropriation is breach of trust. Thus, in the case of Burton, (1824,) the pannel, who was a watchmaker, was prosecuted for breach of trust, for having embezzled a watch put into his hands for the purpose of being repaired.[5] And on the same principle, Mackain (1830) was tried for the like crime, for having sold, for his own behoof, certain cattle put into his hands to graze for two months on his farm.[6]—It is breach of trust if a person appropriate goods which he has found in a situation which does not necessarily infer a knowledge of the owner; as where a landholder finds a stray animal in his field, or a passenger finds a parcel on the road, and fail to use the due means for discovering the proprietor.[7]—The punishment of breach of trust varies, according to the guilt, from imprisonment for a few months to transportation for seven years.

SECTION XIV.

FALSEHOOD, FRAUD, AND WILFUL IMPOSITION.

UNDER this head fall the numerous set of cases known in common language under the name of *swindling*, the fundamental requisite of which is the assumption of a false character, or a false representation of some kind, by which the offender obtains the possession of money, or other property,

1 1 Hume, 59-60. 2 Ibid. 3 Id. 61.
4 1 Hume, 58.—Burnett, 113. 5 Alison, 360. 6 Ibid.
7 1 Hume, 62.

which he appropriates to himself.[1] These cases differ from theft in this respect, that the owner *consents* to transfer the property, though fraud has been used to induce him to do so.[2] They differ also from the mere civil wrong of failure to pay for goods obtained on credit, inasmuch as *fraud* is used to obtain possession of the property.[3] Thus, in the case of Hall, (1789,) the pannel *falsely assumed* the character of a shopkeeper, hired a shop, and filled it with *fictitious* bales, and thus induced persons to furnish him with goods on credit; he was found guilty.[4] A similar result ensued in the case of Kirby, (1799,) where the pannel had obtained a considerable sum of money from a person in Leith, on the *false allegation* that he had a large balance in the hands of his banker in London;[5] in the case of Kinnaird, (1810,) where the pannel, having been discharged from the army on account of rupture, afterwards enlisted, and took the bounty in a militia regiment, and swore before a magistrate that he was free from that complaint;[6] in the case of Harvey, (1811,) who obtained delivery of certain goods lying in a cellar, under the false pretence that he had been sent for them by the owner; in the case of Hutchison, (1818,) for extorting money under pretence of telling fortunes;[7] in the case of Hall, (1827,) who having stolen a deposit-receipt, sent a person to the bank to draw the money, under the false representation that she was authorised to receive it;[8] in the case of Gillies, (1828,) for counterfeiting the signatures of certain ministers and elders, and other persons, and thereby drawing money from Greenwich Hospital, belonging to a seaman;[9] in the case of Brown, (1821,) for levying money by exhibiting a forged certificate of recommendation of him as an object of charity;[10] and in the case of Borland, (1826,) for obtaining from the post-office, by means of false pretences, letters addressed to another, which he opened and read, and turned to his own uses.[11]

It is doubtful whether attempt to defraud is a relevant charge. In the case of Gunn, (Aberdeen, April, 1832,) the libel contained a charge of this kind, but it was departed from by the public prosecutor, on the ground, as it was understood, that the Court, in a recent case,[12] had expressed an opinion against extending much farther the practice of libelling attempts to commit crimes.[13]

[1] 1 Hume, 172. [2] Id. 57.—See before, p. 114. [3] 1 Hume, 173.
[4] Ibid. [5] Burnett, 166. [6] 1 Hume, 174. [7] Ibid.
[8] Ibid. [9] Ibid. [10] Alison, 368. [11] 1 Hume, 175.
[12] Case of Gallie.—See below, "Prison-breaking." [13] Unreported.

The punishment of this offence varies from imprisonment for six weeks to transportation for fourteen years. It is regarded as an aggravating circumstance, that the misrepresentation has been supported by the exhibition of false writings, and in such cases transportation is generally awarded.

SECTION XV.

FORGERY.

FORGERY is the felonious fabrication and uttering, to the prejudice of another, of a false and obligatory writ, as the signed instrument of a person who has not subscribed it.[1]—It is not essential to the crime of forgery, that the subscription of the person forged on should be *correctly* imitated—for any deficiency of this kind affects the prudence, but not the guilt, of the offender. It is in all cases sufficient if the writing was intended to pass for the signature of the person forged on, and might by ordinary persons be mistaken for it.[2] Thus, in the case of Elliot, (1800,) for forging the notes of *Surtees, Burdon*, and Company, it was held to be forgery, though the spurious notes bore the subscription "*Sentees, Bendon*, and Company."[3] The same is true, where a wrong *christian* name is used; as in the case of Gillespie, (1827,) where the forged writing bore the name of *William* Leith, instead of the true name, *James* Leith.[4] It is not essential even that there should be any imitation of a person's subscription. Thus, it is forgery, though the person forged on should be unable to write.[5] It is also forgery, though the signature forged is not that of a *real*, but of a *fictitious* person, provided it is done to the prejudice of a third party; because, in such case, the writing has not been signed by any such person as it purports to be. This was settled in the case of Anderson, 1822.[6] It is also forgery, where the name of the forger, which he adhibits, happens to be the same as that of the person forged on; as where a person gets possession of a bill which stands indorsed to another of the same name and surname, fully described in the indorsement, and which he (the possessor) transfers by indorsing it with his own usual subscription; because, still, in such a case, the offender signs *for* the indorsee, and assumes his person and character.[7]—Forgery may be committed by false *notarial*

1 1 Hume, 140. 2 Id. 141. 3 Burnett, 181. 4 Alison, 372.
5 1 Hume, 141. 6 Alison, 374. 7 1 Hume, 142.

subscription. Where a person is unable to write, the law allows him to execute a deed by two notaries subscribing for him, and upon his mandate, along with four witnesses. If a false deed is subscribed in this way, without the mandate of the person by whom it bears to be executed, it is held to be forged.[1] The same is true, if a man personate another who cannot write, and thus obtains a false notarial subscription, by imposing on the notaries.[2]—It has not yet been decided whether forgery may be committed by the imitation of a mark, or initials.[3] In England this is held to be forgery.[4] —It is forgery to separate a genuine subscription from one deed, and affix it to another; or to write a deed above a genuine subscription, without the authority of the subscriber.[5]—It is also forgery to counterfeit the names of *witnesses* to a false deed; as where a person, on the eve of insolvency, antedates a deed in favour of certain of his creditors, and forges the names of fictitious persons, as witnesses to its execution;[6] but it is doubtful whether the counterfeiting the names of *witnesses* to a *true* deed amounts to forgery.[7]—The *form* of the counterfeit writing is not material, whether it be a regularly attested deed, a holograph writing, or a naked subscription, as an indorsement on a bill of exchange.[8] It is also immaterial whether the deed, if genuine, would be good in law. Thus it is forgery, though unstamped paper has been used for a bill, or the signatures of witnesses omitted in a deed which required that mode of execution; for such blunders do not diminish the offender's guilt.[9] In the case of Henderson, (Perth, September, 1830,) it was held to be forgery, that the pannel had written the name of his master, James Millie, on the back of a bank-receipt, which he afterwards uttered to the bank, and received the contents; though, as the receipt was *blank indorsed* by the person from whom Millie had received it, the indorsation of Millie was not necessary in order to obtain payment from the bank.[10]—Forgery may be committed of all writings, whether public or private, which have for their object patrimonial profit, or any other advantage or gratification of a grave and serious nature; thus, for instance, forgery may be committed of bonds, bills, bank-notes, notarial instruments, revenue-certificates, extracts of decrees or sentences of Court, powers of attorney, letters of credit, receipts, letters of suspension,

1 1 Hume, 143. 2 Ibid. 3 Burnett, 179.—1 Hume, 144.
4 2 Russel, 326, and 344. 5 Case of Forbes, 1820.—1 Hume, 145.
6 1 Hume, 146. 7 Id. 145. 8 Id. 146. 9 Ibid.
10 Unreported.

bonds of caution in a suspension, declarations to fix a crime against a person, letters of recommendation to enable the offender to obtain goods, and certificates of marriage or of character. The *amount* for which a bill, or other document for money, is forged, does not affect the crime; and it would seem that, under the recent statute,[1] it cannot even modify the sentence.

The crime of forgery is not complete, unless the counterfeit writing be *uttered*, or put to use; the fabrication of the writing being held a mere act of preparation, of which the law can take no account.[2] The term *forgery*, therefore, comprehends both the fabrication and uttering, and is so understood in law, wherever it is used.[3] The fabricator of the writing is presumed accessory to the uttering, though that act is not specially fixed on him by the evidence. If the fabricator deny this, it will lie with him to prove in what manner the writing passed out of his possession without his concurrence.[4] The uttering is complete, though the writing does not actually pass, or the imposition take effect. Thus, for example, it is enough if the false bond has been made the ground of action, or if the disposition has been followed by infeftment, or the bill, or note, simply presented for payment; for in all these cases, the offender has done every thing in his power to accomplish his felonious intention, and his guilt is not affected by the circumstance that an immediate detection ensues.[5] Where the offender employs an agent to produce or claim upon the false writing, the uttering is completed, so soon as the writing passes into the hands of the agent, provided the agent afterwards produces or claims upon it.[6] In the case of Devlin, (1828,) where the prisoner had taken the forged note out of his pocket, for the purpose of presenting it, but it fell to the ground, and he was apprehended before it could be picked up, Lord Justice-Clerk Boyle held the uttering not complete.[7]—The vending, or delivering, of forged notes to an asso-

[1] 2d and 3d William IV. c. 123.—See below, p. 147.

[2] 1 Hume, 146.—By special statute, however, the mere fabrication is a punishable offence in the case of bank-notes, and foreign bills of exchange.—41st Geo. III. c. 57.—43d Geo. III. c. 139.—See below, p. 146-7.

[3] 1 Hume, 149. [4] Ibid. [5] Id. 150.

[6] Id. 153.—In cases of this kind, the libel charges the writing as having been delivered for the purpose of being uttered as genuine, *at the time and place, when and where, it was delivered to the hand who uttered it;* and follows this up by a narrative of the time, place, and manner of presentment which this hand adopted in uttering it as genuine to a third party.—Alison, 405. [7] Alison, 402.

ciate at less than their nominal value, and for the purpose of being passed as genuine, does not amount to *uttering;* but it is a criminal act, and may be made the subject of trial as such.[1]

The fabrication and uttering must be *felonious*, or with an intent to injure. Thus, it is not forgery, if one, to accommodate another who cannot write, and at his desire, signs a draft or receipt in the name of that other. But it is forgery, if there be a purpose to gain any sort of advantage, though it should not amount to cheating; for instance, to frame a voucher for a debt, though justly due.[2]

A person is art and part of forgery, and punishable as the forger, by immediate assistance lent to the fabrication. Thus, if one person furnish the scroll of a false deed, another dictate the deed from that scroll, a third write it, and a fourth affix a false subscription, they are all equally guilty of the forgery.[3] A person is also art and part of forgery by uttering the forged writing, knowing it to be forged, though he has had no concern in the fabrication of it. The reason of this is, that, by uttering the writing, he associates himself in the crime, which he thus brings to its destined accomplishment.[4] Accordingly, in the case of Gillespie and Edwards, (1827,) where it appeared that Edwards had fabricated the bills in Gillespie's house, and with his knowledge, and that Gillespie had uttered them, and received the proceeds, it was laid down as clear law by the Bench, that Gillespie, as utterer, was art and part in the forgery; and that Edwards, as the forger or fabricator, was art and part in the uttering, both, of course, being equally guilty.[5] In like manner, in the case of Macdougall, (1814,) a verdict finding the pannel *guilty of the uttering*, and the forging not proven, was held equivalent to a verdict of guilty of forgery.[6] Upon this principle, it is competent to charge the *felonious uttering* of forged instruments, without any allusion to the actual fabricator; and this is always done in modern practice, where there is no reason to believe that the utterer had any share in the fabrication.[7] It is not, however, competent, *at common law*, to charge the mere fabrication, because this act, by itself, is not cognisable as a crime. But, *under certain statutes*, the fabrication may be charged. Thus it is declared a crime, punishable with imprisonment or transportation, to engrave, use, or *possess*, the plates of any bank or banking corporation, or to

1 1 Hume 151. 2 Id. 154. 3 Id. 155. 4 Ibid.
5 Alison, 396. 6 1 Hume, 156. 7 Ibid.

make or use the paper employed in the formation of their notes;[1] and the engraving or printing of foreign bills of exchange, and the like, is punishable in the same manner.[2] The mere felonious *possession* of forged *Bank of England notes* is declared by statute to be a crime punishable with transportation.[3]

Formerly the punishment of forgery was in all cases capital, where the writing forged had direct patrimonial consequences, as, for instance, bills, bonds, missive letters, discharges, testaments, and dispositions.[4] This has been altered by a recent statute,[5] which declares, that where any person shall be convicted of any offence now punishable with death, "which offence shall consist, wholly or in part, of forging or altering any writing, instrument, matter, or thing whatsoever, or of offering, uttering, or disposing of any writing, instrument, matter, or thing whatsoever, knowing the same to be forged or altered, or of falsely personating another," such offender shall not be punished capitally, but shall be transported for life.[6] It is provided, however, that this act shall not affect the case of any person convicted of forging, or altering, or uttering, any will, testament, codicil, or testamentary writing, or any power of attorney, or other authority, to transfer any share or interest of any stock, annuity, or other public fund, transferable at the Bank of England, or South Sea House, or Bank of Ireland, or to receive any dividend thereon.[7] Such offences, therefore, still remain capital. The forging of writs, not directly inferring patrimonial consequences, was not capital by the former law, and is therefore not affected by the recent statute. The following are examples of such writs:—certificates of marriage, death, or baptism; writs intended to substantiate a claim to a certain legal character; certificates of good character, or for the purpose of obtaining charity or relief. Such forgeries are punished with imprisonment or transportation, according to the degree of guilt.[8] A false execution by a notary of a seisin, or other instrument, to which he alone is competent, is punishable capitally. This offence, however, is not forgery, as the offender does not assume the character of another, but merely sets forth a falsehood in his own name and person.[9]

[1] 41st Geo. III. c. 57.
[2] 43d Geo. III. c. 129.
[3] 45th Geo. III. c. 89.
[4] 1 Hume, 147-8.
[5] 2d and 3d Will. IV. c. 123.
[6] Id. sect. 1.
[7] Id. sect. 2.
[8] 1 Hume, 161.
[9] Id. 158.

Evidence in Forgery.

In cases of forgery, the utterer is a competent witness against the forger, and the forger against the utterer, although their evidence must be taken with that caution which their suspicious credit points out.—The person forged on is in all cases a competent witness to prove the forgery, as it is to be presumed that no other person is so well acquainted with his signature. It is no objection to such a witness, that he is under an evident interest, in as much as if he succeed in establishing the forgery, he will relieve himself of all responsibility for the debt, for the law of Scotland in no case holds an injured party disqualified from giving testimony by the interest which may eventually arise to him from the conviction of the offender.[1] But farther, the evidence of the person forged on is, in the general case, necessary, and must be produced, if he is alive, because it is the best evidence. An exception to this rule exists in the case of bank-officers, where the signature of the social firm is in use of being adhibited by different persons, for in such case it is not necessary to bring any of those persons, but merely a bank-officer, who can swear to their signatures.[2] It is also settled, that where a bank-officer in use to sign notes has been disabled from attendance by necessary absence, or ill health, the other signing officer may give evidence as to his signature, and a conviction take place, though he is alive, and has not been examined.[3] Where the testimony of the person forged on cannot be procured, the next best evidence is that of persons acquainted with his writing, and who have seen him write; the next, that of persons who have corresponded with him, though without having seen him write; and the next, a *comparatio literarum*, or comparison of the document in question with his genuine writings, upon the evidence of engravers, and other professional persons, accustomed to compare the similitude of hand-writing.[4] The testimony of the person forged on, if explicit, is sufficient of itself to prove the false nature of the writing; but, if not explicit, some additional evidence will be necessary; as, for instance, a comparison with his genuine writing, made by the jury, or by witnesses in their presence.

It is indispensable to prove that the writing charged as

[1] 2 Hume, 365. [2] Case of Smith, 1827.—Alison, 411.
[3] Case of Kennedy, 1829.—Alison, 412.
[4] 2 Hume, 395.—See before, p. 25-6.

forged was uttered by the prisoner, or by some one with his connivance or accession; and for this purpose, the writing must be traced clearly back, by an unbroken chain of evidence, into the prisoner's hands. Regularly, the person to whom the note was uttered ought to mark it with his initials before he parts with it, so that he may be able to swear to it; but, if this has not been done, every person must be examined who got the note afterwards, as to how he disposed of it, until it was finally marked by some one who can swear to his signature. In the case, accordingly, of Hobson, (Ayr, 1827,) Lord Meadowbank stopped the proof of two of the charges, on the ground that in each charge a witness swore that he gave the note to another witness, and got it back, and that other witness was not adduced to establish that the note which he returned was the same which he had received.[1] In like manner, if the note has been put, without being marked, into a pocket, or other repository, with others, the proof of identification will probably fail, unless the witness had some means of recognising it. This he may sometimes be able to do by its being the only note of a certain bank in the parcel; but, if required, he must explain how he came to remark this circumstance. If the witness says that the forged note was the only note *of any kind* in the repository, the chain of identification will, of course, in that one link, be complete. This minuteness is less necessary where the forged instrument is a bill, bond, or other such writing, because, in such a case, the chance of mistake is much less than in the case of a bank-note; still, however, a clear chain of identification is indispensable; and if the writing has been put into any place where it ran the chance of being mistaken for another instrument, some marking or circumstance which leads to its being satisfactorily distinguished, will be required to complete the proof.

It is in all cases an indispensable point to prove that the prisoner was in the guilty knowledge that the instrument was forged. Where there is no evidence, however, that he was concerned in the actual fabrication of the writing, or received it with information that it was forged, his guilty knowledge can only be inferred from his own conduct, and other circumstances connected with it. In this view, it is a material fact, if other forged notes are found in his possession, especially if they are of the same bank as the note uttered; and this circumstance will probably be conclusive, if

[1] Alison, 619.

the notes so found are concealed about his person, as in his hat, or sewed between his coat and the lining, or the like. It is also an important circumstance if the prisoner sends another person to present the suspected instrument, while he himself is at hand, and could equally well have done so in person; or if, on being challenged, he snatches at the note, or tries to destroy it; or if he intercepts the bank-notices of the forged bill being due, to the persons whose names have been forged. This last circumstance was the principal ingredient of the indirect proof in the case of Gillespie, (1827,) already referred to.[1] It is also important if the prisoner had no reasonable excuse for presenting the instrument; as, for instance, if he changes a note to pay for a trifling article, while he is found to have a large accumulation of silver about his person. The force of this circumstance, however, will be taken away, if the prisoner can give a sufficient explanation of his reason for changing the note. Of still more weight in the scale of evidence is the circumstance of a number of forged notes having been uttered, or attempted to be uttered, about the same time by the prisoner. This it lies with him to explain, both by shewing how he came to be changing so many notes of *any* kind about that time, and how it happened that several of these notes were forgeries.[2] Attempts to utter, when founded on in this way, must be set forth, with the usual specification of time and place, in the libel, and must be proved with the same accuracy as the principal charges.[3] False or improbable accounts given by the prisoner as to the manner in which the note came into his possession, are likewise of importance against him. It is not unusual for utterers of forged notes to state that they found them in the street, or got them from a man whom they never saw before, or the like; but such stories are inadmissible, unless supported by some kind of evidence; and if, in addition to the absence of such evidence, they have varied at different times, they will furnish a strong presumption of guilty knowledge.

The forged writing itself must be produced at the trial, if in existence, and accessible, because the best evidence of the forgery arises from the inspection of it by witnesses in presence of the assize.[4] If the writing has been destroyed by the prisoner, its non-production is no bar to the trial, though it will, of course, increase the difficulty of proving the case.[5] Where it has been lost or destroyed without the prisoner's

1 Alison, 420. 2 1 Hume, 157. 3 Ibid.
4 Burnett, 200. 5 Shaw, 36.

fault, it is not settled whether the trial may proceed; but in such a case, the difficulty in the way of obtaining a conviction would be almost insurmountable.[1] It is certain, that if the non-production in any way arises from the prosecutor, the trial cannot proceed.

SECTION XVI.

OFFENCES AGAINST THE COIN.

THE punishment of these offences is now regulated by statute 2d William IV. c. 34; by which the former enactments, relative to coining and uttering, are repealed, and their provisions amended and consolidated. By that statute it is enacted, (1.) That if any person shall falsely make, or counterfeit, any coin resembling, or apparently intended to resemble, or pass for, any of the King's current *gold or silver* coin; or if any person shall gild, silver, or colour any counterfeit gold or silver coin, or any piece of metal whatever, being of a fit size and figure to be coined, and with intent that the same shall be coined into counterfeit gold or silver coin; or if any person shall in any way alter any of the current silver coin, with intent to make it resemble or pass for any current gold coin, or any of the current copper coin, with intent to make it resemble or pass for any current gold or silver coin, he shall be punishable with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years; and it is provided, that the offence of making or counterfeiting "shall be deemed complete, although the coin so made or counterfeited shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."[2] (2.) If any person shall impair, diminish, or lighten any of the current gold or silver coin, with intent to make the coin so impaired pass for current coin, he shall be punishable with transportation for a term not exceeding fourteen, nor less than seven years, or with imprisonment for a term not exceeding three years.[3] (3.) If any person shall buy, sell, receive, pay, or put off —or shall offer to do so—any counterfeit gold or silver coin, for a lower value than its denomination; or if any person shall import into the United Kingdom any counterfeit gold or silver coin, knowing it to be counterfeit, he shall be punishable with transportation for life, or for a term not less

[1] 1 Hume, 164. [2] 2d Will. IV. c. 34, sect. 3 and 4. [3] Id. sect. 5.

than seven years, or with imprisonment for a term not exceeding four years.[1] (4.) If any person shall tender, utter, or put off, any counterfeit gold or silver coin, knowing it to be counterfeit, he shall be punishable with imprisonment for a term not exceeding one year; and if such person, at the time of such tendering or uttering, shall have in his possession, besides the coin so tendered or uttered, one or more pieces of counterfeit gold or silver coin; or shall, within the space of ten days thereafter, tender, utter, or put off, any more, or other counterfeit gold or silver coin, knowing the same to be counterfeit, he shall be punishable with imprisonment for a term not exceeding two years; and upon a second conviction of any of such offences, he shall be punishable with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years.[2] (5.) If any person shall have in his possession three or more pieces of counterfeit gold or silver coin, knowing the same to be counterfeit, and with intent to utter or put off the same, he shall be punishable, for the first offence, with imprisonment for a term not exceeding three years, and for the second, with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years.[3] (6.) If any person shall, without lawful authority, make or mend, buy or sell, or possess any puncheon, or instrument intended to make or impress the resemblance of any of the current gold and silver coin, or of any parts thereof; or any engine adapted and intended for marking coin round the edges with marks resembling those on the current gold and silver coin; or any press or instrument for cutting round blanks out of any kind of metal, such person knowing such press or instrument to have been used, or to be intended to be used, in order to counterfeit any of the current gold or silver coin, he shall be punishable with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years.[4] (7.) If any person shall, without lawful authority, convey out of any of his Majesty's mints, any instrument or engine used in or about the coining of coin, or any useful part thereof, or any coin, bullion, metal, or mixture of metals, he shall be punishable with transportation for life, or for a term not less than seven years, or with imprisonment for a term not exceeding four years.[5] (8.) If any person shall falsely make or counterfeit any coin re-

[1] 2d Will. IV. c. 34. sect. 6. [2] Id. sect. 7. [3] Id. sect. 8.
[4] Id. sect. 10. [5] Id. sect. 11.

semblling, or apparently intended to resemble, or pass for, any of the current *copper* coin; or if any person shall, without lawful authority, make or mend, buy or sell, or possess, any instrument or engine, adapted and intended for the counterfeiting of any of the current copper coin; or shall buy, sell, receive, pay, or put off—or offer to do so—any counterfeit copper coin, for a lower value than its denomination, he shall be punishable with transportation for a term not exceeding seven years, or imprisonment for a term not exceeding two years; and if any person shall tender, utter, or put off, any counterfeit copper coin, knowing the same to be counterfeit; or shall have in his possession three or more pieces of such coin, knowing it to be counterfeit, and with intent to utter or put off the same, he shall be punishable with imprisonment for a term not exceeding one year.[1]

By section 21st, it is declared, that the "current coin," under this act, denotes the coin coined in any of his Majesty's mints, and lawfully current in any part of his Majesty's dominions, whether within the United Kingdom, or otherwise; and any of the current coin altered so as to resemble or pass for any current coin of a higher denomination, shall be deemed and taken to be "counterfeit coin," within the meaning of the act.

Evidence in Coining and Uttering.

In order to prove that the coin is counterfeit, it is not necessary to adduce the officers of the mint; the evidence of any other credible witnesses is sufficient.[2] In the case of Glass, (1826,) the Court directed an acquittal, because no goldsmiths or persons of skill were adduced to prove that the coin was false.[3] In the uttering of false coin, even more than in the uttering of forged notes, the most minute and scrupulous chain of evidence is required, to shew that the piece of metal uttered by the prisoner is the same as that exhibited to the jury, because it is even more difficult to distinguish one coin than one note from another. The only evidence that can be relied on, in this vital branch of the case, is the oath of every person who got the coin into his hand, that the coin he delivered up or gave to another is the same as he received; and this must be continued, without interruption, from the time it left the prisoner's hand, till it is marked in such a manner as to be always distinguishable. In the uttering of false coin, in the same way as in the ut-

[1] 2d Will. IV. c. 34, sect. 12. [2] Id. sect. 17. [3] Alison, 454.

tering of forged notes, it is competent to lead evidence of unsuccessful attempts to utter, not as substantive charges, but as tending to prove the prisoner's guilty knowledge in regard to the charges libelled; but where this is intended to be done, a narrative must be given in the libel of these unsuccessful attempts, by specification of time, place, and circumstance, otherwise the proof of them cannot be received.[1]

SECTION XVII.

FIRE-RAISING.

To constitute this crime, there must have been actual burning; but it is not material how small a portion of the subject has been consumed.[2] If the fire has only destroyed certain articles of furniture in the house, without having spread to the *fixtures* of the building, the offence is not fire-raising, but only an attempt to commit that crime.[3] The fire must be kindled wilfully, and not by recklessness or negligence. It is not material whether it be done by one person, or by a mob; or whether the fire be applied directly to the thing or tenement which is meant to be destroyed, or to something contained in or nearly connected with it, so that the one being on fire, the other is likely to kindle. Thus, in the case of Campbell and Hamilton, (1806,) the pannels were convicted of wilful fire-raising, for setting fire to a cart-house adjoining a dwelling, whereby both were consumed.[4] This holds good, even where the thing set fire to belongs to the pannel himself, if it be so situated that the safety of his neighbour's property depends on it, (as, for instance, contiguous buildings,) and if any part of his neighbour's property be in consequence consumed.[5] It is not necessary that the incendiary have had a purpose from the first against the very subject which has been destroyed. If one set fire to his neighbour's furze or heath, meaning only to destroy that subject, but the fire gains head and consumes corn and houses, and all that is in the way, he shall be punished in the same degree as if he had from the first intended all this mischief.[6] It is immaterial whether the burning be the ultimate object of the offender, or only a mean employed in furtherance of a different crime, as the burning of a house to facilitate a theft

[1] Alison, 454-6.
[2] 1 Hume, 126.
[3] Id. 128.
[4] Id. 129.
[5] Id. 130.
[6] Ibid.

or murder; or the burning of the doors of a jail to release the prisoners.[1]

Fire-raising is a capital offence, where the property burned is houses, corn, coal-heughs, or woods and underwoods.[2] By *houses* is here understood any buildings, whether dwelling-houses, warehouses, workshops, barns, stables, or other out-houses, if they be not mere hovels, or temporary places of shelter.[3] The crime is completed if a landlord burn his house to injure his tenant, who is in possession; or if the tenant do so to injure the landlord; or if a fiar do so to injure the liferenter, who is in possession; or if the liferenter do so to injure the fiar.[4] In the case of Martin, (1822,) it was sustained as wilful fire-raising, that a tenant had set fire to the shop possessed by him, with a view to defraud the insurers of his furniture.[5] In the case of Gillespie and others, (1827,) it appeared that Gillespie, in order to defraud the insurers, had set fire to a house which had been built by himself, on ground belonging to another, and held by him on a nineteen years' lease. This was considered by the Court as a capital fire-raising.[6] It is not an indictable offence for a man to burn his own house, if it be so situated as not to occasion risk to the property of others.[7] If his object, however, in burning his house be to defraud the insurers, he is guilty of an indictable offence, though it is doubted whether it is capital.[8] But if, in so burning his house, the tenement of a neighbouring proprietor is consumed, the fire-raising seems to be capital.[9] By special statute, the burning of ships, or otherwise destroying them, to defraud insurers, is capital.[10] The burning of corn is capital, whether it is in the field growing, or cut down, and in the stack-yard or barn.[11] The destruction by fire of any other property, moveable or immoveable, may be followed by the highest punishment short of death.[12] The mere attempt, or threat, or solicitation, to commit the crime of fire-raising, is punishable arbitrarily.[13]

Evidence in Fire-Raising.

In proving this crime, the prosecutor has peculiar difficulties to contend with. In most crimes, such as theft, murder, or malicious mischief, the act leaves such vestiges be-

[1] 1 Hume, 130. [2] 1525, c. 10.—1526, c. 10.—1540, c. 33.—1592, c. 148.—1st Geo. I. c. 48. [3] 1 Hume, 132. [4] Ibid. [5] Alison, 455. [6] Ibid. [7] 1 Hume, 133. [8] Id. 134. [9] Ibid. [10] 29th Geo. III. c. 46.—43d Geo. III. c. 113. [11] 1 Hume, 131. [12] Id. 135. [13] Ibid.

hind it as plainly disclose its real character; but this is not true of fire-raising. On the contrary, the spectacle of a wilful and of an accidental fire is quite the same, and, indeed, the more complete the success of the felony, the more thoroughly all the means of detecting it are destroyed. Except, therefore, in those rare cases where direct evidence can be obtained, the prosecutor must rely on such presumptions as can be drawn from the circumstances of the case. It is an article of this tendency that fire breaks out suddenly in an uninhabited house, or at one time in remote parts of the same building; or that combustibles are found strewed in or about the premises, or placed in convenient situations to excite combustion, as under beds, among papers, under thatch, or the like. This matter, however, must always be judged of with much caution, so many are the strange accidents and trifling indiscretions by which the misfortune of burning may be occasioned.[1] The circumstances connecting the prisoner with the crime are generally such as the following: That he had cause of ill-will at the sufferer, or had been heard to threaten him, or had been seen purchasing combustibles, or carrying them in the direction of the premises, or lurking about the place at suspicious hours. To this may be added—where the fire was raised to defraud insurers—the important facts of the premises, or its furniture, having been insured at a high value, or in different offices at the same time, and of a claim having been made, or attempted to be made, at both offices. In the case of Cunningham, (1677,) for burning the house of Glammis, the circumstances were, that he had been a servant at Glammis, and had been dismissed his master's service the day before; he had used strong threats; had been seen preparing combustibles; was found near the house immediately after the fire; could give no account of himself; pretended he had not seen the flames; and when seized, endeavoured to make his escape. He was convicted.[2] In the

[1] Hume, 128.—It is to be remarked, that fire sometimes arises *spontaneously*, that is, without the influence of an ignited body. The following may be considered as the principal sources of this kind of combustion.—1. *Friction*, of which there is an example in the kindling of machinery, when not sufficiently greased. 2. *Fermentation* of vegetable and animal substances, of which the firing of hay, when stacked in a moist condition, is an example. 3. *Chemical action*, as ignition of oils, by various animal, vegetable, and mineral substances; ignition of lime by the affusion of water; ignition of pyrites, &c. There are also instances on record of the spontaneous combustion of human bodies.—See Paris and Fonb. 1. 402-412, and Fodéré, 3. 204.

[2] Burnett, 568.

case of Stewart and Brodie, (1713,) the chief circumstances were, the pannel's being seen near the house after the fire had begun, and malice, on account of a process raised or intended to be raised against him. The jury found the libel not proved.[1] In the case of Burnett, (1784,) the pannel had been seen near the house a short time before the fire with a burning peat, which he pretended he had used to light a tobacco-pipe, but which he had never used in that way; there was also evidence, though slight, of previous enmity. He was convicted.[2] In the case of Douglas, (1827,) the pannel had been seen coming down stairs from the room in which he lodged, in his master's house, and a smoke and smell of fire were immediately perceived. When the inmates of the house went up, they found a candle placed under a chest of drawers containing clothes, so as inevitably to set it on fire, and the clothes and other articles in the room burning. The prisoner was convicted, but being proved to have been insane at the time, was ordered to be confined for life.[3]

SECTION XVIII.

MALICIOUS MISCHIEF.

EVERY serious and wilful damage done to the property of another, whether from malice, or gross misapprehension of legal right, is an indictable offence.[4] If the damage is inconsiderable, and may reasonably be supposed to have arisen from a mistaken apprehension of right, it cannot be prosecuted criminally, unless it has been accompanied with such circumstances of tumult or outrage, as shew an evident disregard of the authority of the magistrate, as, for instance, the entering of a neighbour's lands, with a convocation of servants, and rooting out the woods, or throwing open the inclosures, or burning the boats at a fishery, or destroying the peats in a heath or moss.[5] If the damage is serious and extensive, as, for instance, the poisoning of dogs, sheep, or cattle, or mangling them, by cutting out their tongues, breaking their limbs, or the like, it is an indictable crime, however secretly it may have been executed.[6] In the case of Muir, (1825,) it was held to be malicious mischief, that a collier had knocked away the props of a colliery, whereby the roof

[1] Burnett, 568. [2] Id. 569. [3] Alison, 446.
[4] 1 Hume, 122. [5] Ibid. [6] Id. 124.

fell in; and the like judgment was given in the case of Munro, (1831,) where the pannel had wilfully let some oil-casks run off, whereby oil, to the value of £300, was lost.[1]— The punishment of malicious mischief is arbitrary, according to the magnitude of the offence. By certain statutes, the punishment of death is denounced against those who destroy ploughs, or plough-gear, in time of tillage, or oxen, or other cattle, at seed-time or harvest;[2] but these statutes are not now acted upon.

SECTION XIX.

VIOLATING SEPULCHRES.

THIS crime is not considered as a species of theft, for the law acknowledges no property in the remains of deceased relations, after they have been committed to the grave; it is prosecuted, however, as a great indecency, and a crime *sui generis*.[3] The abstraction of a corpse, before interment, may be prosecuted as theft.[4] The offence of violating sepulchres is completed when the body has been raised, though ever so little, out of its shroud.[5] The attempt to commit this crime is an indictable offence. The punishment varies, according to circumstances, from imprisonment for a short period to transportation.[6] In proving this crime, it is necessary to establish distinctly the identity of the body raised with that set forth in the libel; this is sometimes attended with difficulty.[7]

SECTION XX.

PERJURY.

PERJURY is the judicial affirmation of falsehood upon oath.—The falsehood must be plain and unequivocal, and such as cannot be reasonably reconciled with an innocent intention. In the case of M'Killop, (1754,) it appeared

[1] Unreported.—Wilfully destroying a bill, or other voucher of debt, in the possession of the creditor, with intent to prevent its being used as a voucher of debt by the proprietor against the pannel, or any other person, is an indictable offence. This was found in the case of Murray, (1830,) who, on being required to pay a bill which he had granted, asked to look at the document, and having got it into his hands, tore it in pieces. He was sentenced to three months imprisonment.—Alison, 631.

[2] 1581, c. 110.—1567, c. 83. [3] 1 Hume, 85. [4] Ibid.

[5] Syme, 321. [6] 1 Hume, 85. [7] See before, p. 38-9.

that the pannel had been a witness in a trial for deforcing revenue-officers, and had sworn that the prisoners had addressed the officers in an inoffensive manner, desiring them to make no disturbance. For this he was indicted for perjury, inasmuch as it was offered to be proved that the men in question went up violently to the officers, threatened them, and demanded their arms. The Court held this charge irrelevant, inasmuch as the two statements might relate to different periods of the affray, and did not, therefore, necessarily infer perjury.[1] In like manner, a charge of perjury cannot, in general, be founded on a mere omission in the oath of the pannel, unless the circumstance omitted was specially put as an interrogatory, and its existence distinctly denied.[2]—The falsehood must be affirmed absolutely: perjury will not be committed if the person have sworn doubtfully, or according to the best of his recollection in regard to facts, about which, from their distant date or otherwise, he might naturally be uncertain. It is otherwise if the facts are recent, and such as the pannel must have accurately remembered, for his swearing doubtfully in regard to facts of that kind will not screen him from the pains of perjury.[3] A witness is bound to tell the whole truth, and, therefore, his concealment of what he remembers, or his pretending indistinctness of recollection in regard to it, is as much a violation of his oath as a direct allegation of what is known to be false.[4]—The falsehood must be affirmed wilfully, by one who knows the truth, and improperly resolves to conceal it. Perjury, therefore, cannot, in the general case, be committed in oaths of pure opinion and belief, such as the oath in lawburrows, where the law means absolutely to trust the person swearing, and where, from the nature of the thing, no conclusive evidence can be obtained of his consciousness of the falsehood.[5] An oath of opinion, however, may be such in point of form only, and not of substance, as where a person swears, on an application for a *meditatio fugæ* warrant, on a bill which he himself has forged; or an architect declares a tenement to be ruinous which is in good condition. In these instances there is as decisive evidence of the falsehood of the pretended opinion and belief, as if the oath had related to any visible and ordinary fact.[6] False oaths of opinion are, therefore, perjury, where it can be shewn that the party did not believe what he swore he believed.—The falsehood must be in a matter competent to be asked of the witness; but the degree in which it may affect the matter at issue is not

[1] 1 Hume, 366. [2] Id. 367. [3] See before, p. 44.
[4] 1 Hume, 368. [5] Ibid. [6] Id. 375.

material.[1] In the case of Maccurley, (1777,) who was accused of perjury, by swearing falsely that he had not given a different account of the matter when precognosced than he gave on the trial, the charge was abandoned, as the question was held to have been incompetent.[2] Perjury may, of course, be committed by a false oath upon an examination *in initiallibus*.[3] To constitute perjury, the affirmation in all cases must be upon oath, except by peers in certain situations, and by Quakers. The oath must be made before one having authority by law to exact or receive an oath in that matter; an oath to a private person, or a voluntary affidavit, not required or acknowledged by law, before a magistrate, is not sufficient.[4] The same is true of an oath emitted in ecclesiastical proceedings.[5] The oath must be in the due and accustomed form in the department of business to which it relates; the omission, therefore, of any of the ordinary solemnities in taking the oath will bar a prosecution for perjury.[6] It is not material whether the oath has been emitted in a civil, or criminal matter; or by a witness or a party; or whether it relates to an act done by the deponent himself, or to one done by another person. In the case of Hay, (1824,) the pannel was convicted of perjury at common law, by falsely taking the oath prescribed in the Sequestration Act.[7] In the case of Taylor, (1826,) an indictment for perjury was sustained, grounded on falsehood deponed to before a magistrate, with a view to obtain the benefit of the Act of Grace.[8] In like manner, the oath of bribery at elections; of a suspender on juratory caution; and of executors giving up a false inventory, may be the foundation of a prosecution for perjury. Perjury may be committed on a reference to oath; or in an oath put *ex officio judicis* to elicit the truth. In the case of Somerville, (1813,) the pannel having sworn on a reference that he had given full value for a bill, was afterwards convicted of perjury, the falsehood of the oath having been established.[9] Where a charge of perjury is founded on contradictory oaths emitted by the same person, the prosecutor must specify which of the oaths is false, and so peril his case upon the means he possesses of proving perjury in that particular deposition.[10] Perjury is not inferred by breaking an oath, as in the case of one who takes the oaths to Government, and afterwards levies war against the King, because this is not an affirmation of falsehood upon oath, but a neglect of a

1 Burnett, 206.—1 Hume, 369. 2 Ibid. 3 1 Hume, 369.
4 Id. 370. 5 Ibid. 6 Id. 371. 7 Id. 374.
8 Alison, 472. 9 Id. 473. 10 1 Hume, 372.

solemn engagement.[1]—The punishment of perjury is arbitrary, varying, according to the magnitude of the offence, from imprisonment for a few months to transportation.

Evidence in Perjury.

The proof of the tenor of the oath is a matter of great importance, on account of the facility with which mistakes may occur, in regard to the words uttered, and the omission of particulars, by which apparent falsehoods may be explained or accounted for. It is accordingly a rule, that, in all those cases where regularly, and in common course, the oath ought to be reduced to writing, no other evidence of the tenor of the oath is admissible but a written record, signed by the party's own hand, and the judge, or by the judge alone, if the party cannot write, and proved at the trial by that judge's deposition.[2] In courts where the depositions of the witnesses are emitted *viva voce*, and their substance only taken down by the judge, as in the Justiciary Court, it is desirable that the deposition which is meant to be founded on as a perjury, should be reduced to writing, read over to the deponent, and signed by him, if he can write, and by the judge in his presence. This course has accordingly been followed in all cases where prosecutions for perjury have been instituted, on account of what has been sworn in the Supreme Criminal Court.[3] It is doubtful whether the *notes* taken by the judge, where such a practice is usual or legal, is sufficient evidence of the tenor of the oath, without having it formally reduced to writing. In cases where the court before whom the trial for perjury is to proceed, is different from that where the false oath was emitted, an extract should not be admitted, but the oath itself, if taken down in writing, must be produced.[4]

The falsehood of the oath is established by evidence of any sort, either written or parole, and that, too, indiscriminately, whether the oath be that of a party or of a witness.[5] It is not, however, sufficient to shew that the pannel swore to what was false; it must be farther proved that he knew it to be false, and this corrupt state of his conscience is to be collected from the whole circumstances of the case. If, for instance, the pannel is charged with perjury, in respect of his having sworn that John did not fire at James on a certain occasion; evidence

[1] 1 Hume, 371. [2] Id. 375.—Burnett, 562. [3] 1 Hume, 375.
[4] Burnett, 562. [5] 1 Hume, 376.

must here be given, not only of the firing, but of its having happened at a time and place when the pannel was present, and so situated that he could not but see and hear the shot; which may farther be made evident from his conduct at the time, and his conversation afterwards.[1] In cases where the perjury consists in a false narrative of conversations, and the discrepancy lies merely in the *import* of what was said, much allowance must be made for the mistakes of language, and the different meaning attached to expressions, according to the different passions of the hearers.[2] The case is of course different, if the oath challenged either assert that a conversation took place, where it can be proved it did not, or deny that it took place, where it can be established it did; for in such a situation, the same allowance for error cannot be made. The most unfavourable case for the pannel, and that which admits the most decisive evidence against him, is where the perjury has been committed in regard to any action of *his own;* as where he has sworn that on such a day he was at such a place, and that certain things were there done by him; while it can be proved that he was then elsewhere, and differently employed.[3] Where the oath relates to the acts *of others*, the proof is of course more difficult. In such cases, perjury is not to be inferred from the mere fact of there being a discrepancy, even of a very serious kind, between the story told by one witness and others, in regard to the same transaction, unless it is of so gross and glaring a kind, that it is impossible that both can be true. For such is the variety of lights, in which even the same acts strike different observers in different situations, and such the different *media* through which they are viewed on a retrospect, according to their several passions and inclinations, that without any positive intention to deceive, the story ultimately told comes to be essentially, and to appearance irreconcileably, different. This is more especially the case, if the deposition relate to an affray or struggle in which the witness himself bore a part, for the account given on the opposite sides in such cases is almost invariably different, and strongly tinged with the passions with which the parties are respectively actuated at the period when it took place. The case is different, however, where the witness swears to a fact altogether false, as the presence of a party who was not there, or the appearance of weapons, when none were in the possession of those engaged in the scuffle; for, after making every allow-

[1] 1 Hume, 377. [2] See before, p. 39, *et seq.* [3] 1 Hume, 372.

ance for the different lights in which witnesses on opposite sides view the same facts, there can be no excuse for the total invention of a fact which had no existence.—In considering the evidence in cases of perjury, it is always to be recollected that it is merely the weighing of oath against oath; and, therefore, the evidence tending to prove the falsehood must clearly and decidedly preponderate in order to warrant conviction.[1]

SECTION XXI.

SUBORNATION OF PERJURY.

SUBORNATION of perjury is the procuring a person to give false evidence as a witness.—It is necessary that the person practised upon should yield to the seduction, and swear to the concerted falsehood, otherwise the crime is only an attempt at subornation. It is not material what the unlawful means are which have prevailed with the witness—whether bribe or good deed, or the promise of such; or the use of violence, or threats of mischief, if the witness shall refuse.[2] Nor is it material that the suborner has not, in direct terms, covenanted with the witness for a false story, but in other and more artful ways accomplishes the same end, as, for example, by putting into his hands a written narrative of the matter to guide him in his deposition.[3] The crime of attempt at subornation is committed, though no oath has been given, and even though the party practised upon has immediately rejected the solicitation. It is necessary, however, in such a case, that the inducement has been tendered to the witness in an overt and palpable shape, and in such a manner as testifies an earnest and serious determination to seduce.[4] The punishment of subornation and attempt at that crime is arbitrary, and varies from a few months' imprisonment to transportation.—All practices to procure false evidence, though not properly falling under the name of subornation, are punishable as crimes.[5]

Evidence in Subornation.

It is scarcely necessary to mention, that the person suborned or practised on, if not already convicted of the perjury, is a competent, and must ordinarily be the principal witness

[1] Alison, 477-8.
[2] 1 Hume, 381.
[3] Ibid.
[4] Id. 382.
[5] Id. 383.

against the suborner. If he has yielded to the temptation, his testimony must, however, be received with reserve, and would require to be confirmed by circumstances of some weight.[1]

SECTION XXII.

DEFORCEMENT.

DEFORCEMENT is the hindrance or resistance of an officer of the law in the execution of his duty.[2]—The person resisted must be a lawful officer, one of the regular and proper executors of that sort of diligence which is hindered. Thus, if he be only *in cursu* of being appointed an officer—as, for instance, a messenger, who has not yet found caution—or if he has been suspended from office, or, though a lawful officer, if he be meddling with a business which does not belong to his official duty, as if a sheriff-officer be executing letters under the signet, or a constable executing the sheriff's precept, in all these situations deforcement is not committed. The same seems to hold with regard to a private individual to whom a warrant has been specially addressed.[3] At the time of the resistance, the officer must be in the execution of something to which he is bound by his commission. Thus it is not deforcement if he is attacked in his own house, and has the letters of caption taken from him, or if he is met half-way upon the road, and is there stopped, and robbed of his diligence.[4] It is not, however, indispensable that the first formalities of the execution be actually commenced at the time of the hindrance, if the messenger have assumed his official character, and entered on his commission, being in near and immediate preparation to proceed to the first formalities, if he shall be allowed. Thus it is deforcement, if, when the messenger, bearing letters of caption, has come near the debtor's house, he is met by a host of people who drive him off, on notice or suspicion of his errand; or if, instantly on entering the debtor's field, with a view to poind his cattle, he is assailed and driven off, before he can even begin to read the letters.[5] The officer, at the time of the resistance, must be proceeding in a formal and legal manner. This includes several articles of duty; and first, the officer must notify his quality as a servant of the law, which is sufficiently done, in the case of messengers and constables,

[1] 1 Hume, 383. [2] Id. 386. [3] Ibid.
[4] Id. 387. [5] Id. 388.

by the display of blazon and baton, the known badges of their commission; this, however, is not indispensable, if the officer be personally known to the party.[1] The officer must notify that he is acting officially, unless it appear that the opposers were aware of his errand. He must shew his warrant, if required by the party; but he is not bound to part with it, or put it out of his own hands.[2] In the case of revenue-officers making seizure of smuggled goods, it is a sufficient notification if they announce aloud that they are King's officers, and make seizure of the goods in the King's name; though even this is not necessary, if it appear that the opposers knew their quality and errand.[3] It is not deforcement if the officer is resisted in acting illegally, as, for instance, in executing letters of caption on a Sunday, or after seeing a sist or suspension of them; or in poinding goods at night; or in breaking open doors to poind, without letters of open doors;[4] or if the warrant on which he proceeds is *ex facie* illegal or informal.[5] But it is no defence that payment was tendered to the officer on the spot, unless he had a special power to receive and discharge the debt. In cases where the officer may be resisted, the party is entitled to do nothing more than is absolutely necessary to stop him, and, if he proceed to acts of outrage, he may be punished for the assault and injury.[6] To constitute deforcement, the violence used must be done with the design of resisting the process of the law, and it must be so considerable as, with a person of ordinary firmness, to have that effect. Thus it is sufficient if the officer is assailed and beat off with stones or other missiles, though without bodily injury; or if arms are exhibited by his opposers, and he is forbid access to the house; or if the debtor is forcibly taken out of his hands after having been apprehended.[7] The officer must be actually hindered; if he persist and accomplish his object, the opposition is not deforcement, but only an attempt to deforce, or an assault.[8] In like manner, it is not deforcement if the violence takes place after the diligence has been completed; or if the officer, after having abandoned his purpose, is met on his way home by another set of persons who assail him, on account of what was previously done or attempted.[9] On the other hand, it is clear, that, if the resistance has once compelled the officer to abandon his purpose,

[1] 1 Hume, 389. [2] Id. 390.
[3] Case of Lamont and Smith, 1826.—Alison, 497.
[4] 1 Hume, 392. [5] Id. 200. [6] Id. 393.
[7] Id. 395. [8] Ibid. [9] Id. 388.

the offence will not be purged by any subsequent submission of the refractory parties.[1] Deforcement may be committed in regard to the concurrents or assistants of the officer, while aiding him in the discharge of his duty, for they are considered as the hands by which he acts, and any opposition offered to them is regarded in the same light as opposition to himself. It is not material what is the nature of the legal process which is prevented from being carried into effect, whether letters under the King's signet, or the precept of a sheriff, or even of a baron court; or whether it relate to the execution of diligence, as letters of poinding, or of a mere summons, or of a warrant to apprehend a criminal. In the case of Costine, (1712,) it was found to be deforcement that a steward-officer was hindered from levying the mart-cow.[2] A numerous and important class of cases arises from the resistance of smugglers to the seizure of smuggled goods, or goods suspected to be smuggled, by officers of the customs or excise. Such cases are judged of in the same way as where resistance is offered to a messenger or sheriff-officer executing legal diligence.—All persons concerned in the opposition are guilty, though they be not the parties against whom the officer is proceeding, and have not been incited by them; the degree of accession which shall be held sufficient to implicate them, depends on the general principles of art and part applicable to all offences.[3]—Deforcement is punished with imprisonment or fine; but, in cases where the messenger has been wounded, or loaded fire-arms employed, transportation is not unfrequently inflicted.[4]

Evidence in Deforcement.

Where the prosecution is at the instance of the Lord Advocate, the messenger and his assistants, if he has any, are not only competent, but necessary witnesses. Where the prosecution is at the instance of the messenger, it has been found, in one case, that it is no sufficient objection to an assistant giving his testimony, that he is a near relation of the messenger.[5] The party who is the employer of the messenger has an interest in the escheat or forfeiture of the pannel's moveables on conviction; this would probably not disqualify him from being a witness, though it should certainly make the jury cautious in receiving his testimony.[6]—It is not ne-

[1] 1 Hume, 396. [2] Ibid. [3] Id. 397. [4] Ibid.
[5] Id. 400. [6] Id. 399.—Alison, 509.

country to produce the officer's commission, to prove that he is an officer of the law; his oath to that effect is sufficient. If, however, the commission be libelled on, and produced, any informality in it will be fatal to the charge. Thus, in the case of Graham and others, (1824,) for deforcing a water-bailie, the indictment libelled on the act appointing the bailie, and set forth that he had been regularly appointed; but as it turned out, upon examination of the document, that the appointment was by one, instead of two justices, which the act required, it was held by the Lord Justice-Clerk Boyle, that the whole charge, based on that alleged regular appointment, must fall to the ground.[1]

SECTION XXIII.

MOBBING.

MOBBING or Rioting signifies a tumultuous assemblage of a number of persons for a violent purpose, to the disturbance of the public peace.[2] The number of persons must be considerable, but this is not the subject of any specific rule; assemblages of seventy, fifty, and forty persons have been libelled on as amounting to a mob, and the indictments sustained by the Court.[3] There may be a convocation for an unlawful purpose which is not mobbing, as a secret assembly to contrive the death of the King; there not being, in this case, that apprehension of violence to the neighbourhood which is essential to mobbing. This crime may be committed in doing a lawful act, as executing a diligence, or searching for smuggled goods, if it is done with tumult and disorder.[4] Of course, therefore, it is mobbing if persons proceed tumultuously to remove a nuisance, instead of taking the proper legal measures for that purpose. The assemblage must be a *combination* for violence, in defiance of authority, to the prejudice of others. It differs, therefore, from a casual affray or quarrel arising suddenly among individuals who have no such hostile views against the peace of the neighbourhood; but it is sufficient that a tacit confederacy have been formed after the meeting: it is not necessary that the meeting was called together for the express purpose of violence.[5] It must be for an object of *private* concern, as to liberate a certain criminal from prison, or to break down a certain inclosure; for if it

[1] Alison, 492. [2] 1 Hume, 416. [3] Alison, 510.
[4] 1 Hume, 416-17. [5] Id. 418.

be for an object of *public* concern, as to throw open all prisons, or to break down all inclosures, it is not mobbing, but treason.[1] It is enough if there is a tumultuous assemblage for a violent purpose, though no farther movement is made towards the execution of it. The guilt, of course, is increased where the assembly proceed to acts of violence, as the destruction of property, the injuring the persons of individuals, or constraining and intimidating them, or the like.[2]

A person may be art and part of this crime by assistance or instigation, though not present in the tumult. Presence in the mob, for a short time, from indiscretion or curiosity, does not subject a person as art and part; but a different decision will be given if the circumstances shew that he intended to countenance and abet the unlawful proceedings, as where a workman or mechanic is found in a mob at the distance of miles from his house, and is proved to have gone with them from place to place, and to have been always in the throng of them, and without any pretence of a lawful errand in that quarter of the country.[3] Accordingly, in the case of Forrester, (1831,) charged with mobbing and assault, it was proved that he was in the mob which made the tumult, but his accession to the assault was not established, and so the jury found; upon which he had sentence of nine months' imprisonment.[4] One who joins himself to a mob becomes art and part in all their criminal proceedings, done in pursuance of the common design of the assemblage; but not of such as are taken up at the moment by detached parties, with which he was not present. In the case of Marshall and others, (1824,) it appeared that a mob of lads from Dundee attacked some country masons near that place, one of whom was killed. It did not appear that there was any intention on the part of the prisoners either of committing murder, or of assaulting the masons in a reckless and outrageous manner; and the proof failed to fix the fatal blow on any one of them, while it clearly shewed that one blow in particular had occasioned death, and that the prisoners were present and active in the mob. In these circumstances, it was laid down by the Lord Justice-Clerk Boyle, that the acts of mobbing and assault were fairly chargeable on all the prisoners, without distinguishing who actually committed them; but that the murder, which was the result of one blow, and not of a succession of smaller injuries, and which did not appear to have been part of the general design, could be fixed only on

[1] 1 Hume, 418. [2] Id. 419. [3] Id. 421-3. [4] Alison, 537.

the person who struck the fatal blow. The prisoners were accordingly convicted of mobbing and assault.[1] Where murder, fire-raising, stouthrief, or any other capital crime, is combined with mobbing, the prosecutor cannot, in the proof of such charges, resort to the latitude of the principle admitted in the proof of violence committed under a charge of mobbing; that is, he cannot obtain a conviction of these crimes by merely proving that murder, or fire-raising, were committed by the mob, and that the prisoner was present in the crowd, and assisting their proceedings. Under such a proof he may obtain a conviction of mobbing, warranting the infliction of the highest arbitrary pains; but for a conviction of the capital crime, he must bring home the perpetration of that offence individually to the pannel, just as if he stood charged with it alone.[2]

The punishment of mobbing, at common law, varies from imprisonment for a few months to transportation for life.[3]

Mobbing under the Statute.—The act 1st Geo. I. c. 5, commonly called the *Riot Act*, has considerably extended the common law in regard to mobbing. This act contains two principal provisions. (1.) By one provision it is made capital, if any persons, unlawfully assembled together, shall riotously demolish, or begin to demolish, any church, dwelling, or out-house.[4] This crime is committed by tearing down the doors or window-sashes of a house, if done by persons within the building, but not if done by persons from without, in order to obtain entrance. The destruction of statues, vases, and other exterior ornaments of the house and gardens, is not sufficient. Nor does the act apply to the burning, or blowing up, of a house.[5] (2.) By the other provision of the Riot Act, it is made capital, if twelve or more persons, being riotously assembled, shall continue together for an hour or upwards, after being ordered, by proclamation from the lawful authorities, to disperse. The proclamation must be made, if in a county, by a justice of peace, or by the sheriff, or under-sheriff; if in a town, by the bailie, or other head officer, or by a justice of peace of the town: it is not sufficient if the proclamation be made by an ordinary constable, or peace-officer.[6] The proclamation is in these words, or "like in effect:"—"Our Sovereign Lord the King chargeth and com-

[1] Alison, 525. [2] Id. 526. [3] 1 Hume, 426.

[4] This provision is extended to *mills*, 9th Geo. III. c. 29, sect. 1; to *manufactories* and *warehouses*, 52d Geo. III. c. 130, sect. 2; and to *engines*, or other works belonging to collieries, 56th Geo. III. c. 125, sect. 1.

[5] 1 Hume, 434. [6] Id. 435.

mandeth all persons being assembled immediately to disperse themselves, and peaceably depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George the First, for preventing tumults and riotous assemblies.—God save the King." The giving of this command is commonly called *reading the Riot Act.* It is not necessary, in order to authorise proclamation, that the meeting have proceeded to any felonious attack upon person or property, such as wounding, fire-raising, or breaking into houses; it is sufficient that the persons be unlawfully, riotously, and tumultuously assembled; that is, with such circumstances of force, agitation, and disorder, as are alarming to the liege, and amount to a disturbance of the public peace. And if they continue so assembled, for an hour after proclamation, they are guilty of the capital crime, though they have not attempted to commit any felonious outrage.[1] The capital crime is committed by all who were present when the proclamation was made, (for all such are presumed to hear it,) or who were duly informed of its having been made, and are in the mob after an hour from its being made. The same is true of all who hinder the proclamation from being made, and of all who continue unlawfully assembled, to the number of twelve, for an hour after such hindrance, provided they are duly informed of it. The act farther provides, that if the persons assembled do not disperse within an hour, the magistrate, or other authorities, may apprehend such persons; and if any of them are killed in consequence of their making resistance, the officers are indemnified, if they have acted with due humanity and discretion. The power of checking riotous proceedings, of course, belongs to the magistrate at common law; but, in addition to this, the above provision entitles him to disperse a tumultuous or menacing assembly *before they have proceeded to any excesses.*[2]

Evidence in Mobbing.

It has been held in England, that resolutions passed at a former meeting assembled a short time before in a distant place, but at which the pannel presided, he having also presided at the one in question, were admissible evidence to shew the intent of assembling and attending the meeting in question; and that a copy of these resolutions, delivered by

[1] 1 Hume, 425. [2] Id. 437.

the pannel to the witness, and which corresponded with those which the witness heard read from a written paper, was admissible without producing the original.[1] It was also held, in the same case, that where large bodies of men came marching in regular order to the place of assemblage, it was competent to prove that, within two days of the time when it took place, a number of persons were seen drilling before day-break at a place from whence one of these bodies came, and that parole evidence of the inscriptions and devices on banners and flags was competent, without producing the originals.[2] When the question is, with what intent a number of persons assembled to drill, declarations made by those assembled, and in the act of drilling, and declarations or solicitations made by them to others to accompany them, declaratory of their object, are admissible to prove the intent of the assemblage, and in general any evidence to shew that the meeting caused alarm and apprehension, and that, in consequence thereof, information was given to the proper authorities.[3]

SECTION XXIV.

NIGHT-POACHING.

It is provided by statute 57th Geo. III. c. 90, that if any person shall enter into any park, or other open or inclosed ground, with the design to take or kill game or rabbits, or to assist in doing so, and shall be found there at night, armed with a gun, or other offensive weapon, he shall be held guilty of a misdemeanour, and be punishable with transportation for seven years. If any one of a party is armed, all who are with him, knowing the fact, are within the statute. It is not a sufficient defence that the parties had put down their arms and left them, before they were seen, if it appear that some one was there armed before the discovery was made.[4] It is sufficient if the pannel is seen in the ground, though he is only apprehended *coming out of it*.[5]—By the same statute, it is lawful for rangers, gamekeepers, &c. to apprehend offenders, and bring them to justice, whether they are found armed or not.—The punishment that has been usually inflicted under this statute is imprisonment for a few months.

By a subsequent statute, 9th Geo. IV. c. 69, it is provided,

[1] 1 Russell, 268. [2] Ibid.
[3] 2 Starkie, 1510.—1 Russell, 218.—Alison, 535.
[4] 1 Russell, 418. [5] Case of Ramsay, 1828.—Alison, 550.

that where persons are found in the ground, as before stated, *to the number of three or more together*, and any one of them armed with a gun, or other offensive weapon, they shall be punishable with transportation for fourteen years. In the case of a single individual, it prescribes imprisonment for the two first offences, and transportation for seven years for the third; but where the offender offers violence with any offensive weapon to the gamekeeper, or other person apprehending him, he is punishable with transportation for seven years, even for the first offence. It is declared that, for the purposes of the statute, the word "game" shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards;—and *the night* shall be held to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

SECTION XXV.

PRISON-BREAKING.

PRISON-BREAKING is punished as an offence committed against justice, by breaking a state of lawful custody. The place from which the escape is made must be a proper public and established jail; but whether that of a county, a burgh, or a barony, is not material.[1] A bridewell, or house of correction, would be considered a prison in this matter; and the same would hold of the Edinburgh lock-up-house, it having been declared by the act for erecting the jail a part of the tolbooth of Edinburgh. Escape from more temporary and occasional places of custody may be a crime, especially if accomplished by violence, or attended with tumult, but it is not prison-breaking.[2] The mode of escape is not material, whether it be by effraction of the building, or by violence to the keeper, or by artful devices, such as the use of false keys, or by corrupting the jailor, or even by taking advantage of any opportunity, though not of the prisoner's own contrivance, to leave the jail and escape. Thus, in the case of Ratcliffe, (1739,) a person confined for a capital crime, it was held to be sufficient that he had left the jail when it was thrown open by the Porteous mob.[3] The breaking out of a cell in a jail, without escaping beyond the walls of the jail,

[1] 1 Hume, 404. [2] Ibid. [3] Id. 401-2.

is not prison-breaking. In the case of Gallie, (2d April, 1832,) the charge was, that the prisoner, having broken out of his cell in the third floor of the bridewell of Aberdeen, forcibly raised the flagstones of the third and second floors, and made his way to the first floor, where he was secured by the jailor, after a violent struggle, in which the latter received some personal injury. This the Court held not to amount to prison-breaking, the pannel not having made his escape, or even occasioned such an effraction of the prison as was necessary for escape.[1] This crime may be committed by any prisoner, whether he is confined for a civil or a criminal cause, or even on a capital charge.[2] The state of custody from which the escape is made must have been lawful; the warrant must have been granted by competent authority, and *ex facie* regularly; but even though the custody is not lawful, if the escape is made with outrage, and especially if it is done by means of a mob from without, the act, though not amounting to prison-breaking, is punishable.[3] If the warrant is apparently good, and not bearing any flaw on the face of it, the prisoner will not be excused for seeking his escape on account of any remote and less palpable irregularities which may have happened in the proceedings anterior to the application for the warrant, or even in the immediate course of process to obtain it, as, for instance, where a *meditatio fugæ* warrant has been granted on an irregular oath, or letters of horning have issued on a decree of the justices of peace: in such cases the prisoner must submit for the time, and seek his relief afterwards, in course of law.[4]—The attempt to break prison is a relevant charge. In the case of Gallie, above referred to, the Court held that the circumstances there set forth, as already mentioned, were sufficient to warrant a charge of attempt.—The punishment of prison-breaking, in modern practice, is imprisonment, unless it is accomplished by mobbing or external violence, in which case a higher punishment may be inflicted.

SECTION XXVI.

RETURNING FROM TRANSPORTATION.

By statute 5th Geo. IV. c. 84, it is enacted, that if any offender, who shall have been sentenced to be transported,

[1] Unreported. [2] 1 Hume, 401. [3] Id. 403. [4] Ibid.

or who shall have agreed to transport himself on certain conditions, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, he shall be held guilty of a capital crime. It is of no consequence whether the pannel was actually sent to New South Wales, or to the Hulks, or the Penitentiary, or never removed from a jail in Scotland; for in all these cases he is equally under sentence of transportation, and liable therefore to the pains of the statute.—It has been held in England, that where a prisoner has agreed to transport himself, and has been prevented by bad health, that impediment amounts to a lawful excuse.[1] —The punishment of this crime has been hitherto confined to transportation.[2]

Evidence in Returning from Transportation.

In proving this crime, the prosecutor must of course commence with establishing the first conviction, and its application to the prisoner. This is to be done by production of the extract of the conviction, which proves itself, and proof by two persons who saw the prisoner convicted, or who saw him in jail under warrant of the sentence, and can prove its application to him. Having done this, and proved that the pannel was found at large in this country before the term of transportation expired, he has done enough to obtain a conviction. If the pannel has any lawful excuse, as liberation for good conduct, or the like, which is sometimes the case, it lies upon him to prove it in defence, and remove thereby the presumption which his appearance at large, before the expiration of his time, is fitted to produce.[3]

SECTION XXVII.

INVADING AND SLANDERING JUDGES.

To strike or hurt any judge whatever, when sitting in judgment, is a capital offence;[4] and to kill any of the Lords of Session or Justiciary, sitting in judgment, is treason.[5]— Any act of violence, insult, or disorder, the use of reproachful or threatening words, the challenging to fight, or the insinuating of mischief or revenge, or exciting others to their commission, if offered to a judge, either in or out of Court,

[1] 1 Leach, 396.—1 Russell, 404. [2] Alison, 559. [3] Id. 560.
[4] 1593, c. 177. [5] 7th Anne, c. 21.

on account of his judicial proceedings, is a punishable offence.[1] Accordingly, in the case of Duncan, (1827,) for striking a magistrate of Edinburgh, on account of a judicial proceeding, the pannel was sentenced to six months' imprisonment.[2]—The slandering of judges, or speaking, or writing of them, in abusive or libellous terms, on account of any thing done by them in their judicial capacity, is also an indictable offence, both at common law and by statute.[3] In the case of Macmillan, (1831,) the charge against the pannel, of having written calumnious letters to the sheriff-substitute of Fort-William, in relation to a process depending before him, was unanimously held relevant by the Court.[4] In the case of Porteous, (12th March, 1832,) for writing a threatening and calumnious letter to the sheriff-depute of Clackmannanshire, the prisoner pleaded guilty, and was sentenced to be imprisoned for one month, to pay a fine of £20, and to find security to keep the peace for five years.[5]

SECTION XXVIII.

SENDING THREATENING LETTER, OR CHALLENGE.

THE denunciation of fire-raising, or other atrocious mischief, in writing, or incendiary letter, (as it is often called,) addressed and conveyed to the person who is the object of the threats, is a high crime, whether the writing be signed with the real name of the writer, or be anonymous, or be signed with a fictitious name. The punishment of this crime is arbitrary; transportation for life has been inflicted.[6]—Even the verbal threatening of personal mischief, if violent and pointed, is punished, by obliging the offender to find caution to keep the complainer free of harm, under such penalties as the Court think fit.[7]

The sending a challenge to fight a duel is an indictable offence, both to the sender and acceptor of it. The challenge must be serious and formal, and not mere hasty or intemperate expressions, or passionate words of defiance, even though importing a design to fight, if these are not followed up with more deliberate proceedings.[8]

It is doubtful whether *posting* a person, for not accepting a challenge, is an indictable offence; it is probable, that it

1 1 Hume, 405.
2 Syme, 280.
3 1540, c. 104.
4 Alison, 575.
5 Unreported.
6 1 Hume, 459.
7 1 Hume, 442.
8 Ibid.

might be charged as an aggravation of the crime of sending a challenge. In the case of M'Kechnie, (14th July, 1832,) the prisoner was charged with sending a challenge, and also with breach of the peace, by posting, for not accepting it; but the prosecutor did not insist in the latter charge.[1]

SECTION XXIX.

FRAUDULENT BANKRUPTCY.

FRAUDULENT Bankruptcy is the wilful cheating of creditors by an insolvent person, or one who conducts himself as such.[2]—The acts 1621, c. 18, and 1696, c. 5, denounce certain punishments against fraudulent bankrupts; and the Sequestration Act, 54th Geo. III. c. 137, § 33, declares, with respect to any bankrupt sequestrated under it, "That if he shall wilfully fail to exhibit a fair state of his affairs, or to make oath, as appointed by the act, to the fairness or fulness of his disclosure of his means and funds, or to make a complete surrender of his effects and estate, he shall be considered as a fraudulent bankrupt, and punished accordingly with infamy and other pains." The points to be established to a jury are:—1. That, by some alienation, abstraction, or concealment of property belonging to the bankrupt, the estate divisible among his creditors has been diminished. 2. That it has been diminished contrary to law, that is, either contrary to the provisions of the acts 1621, 1696, or the Sequestration Act, or by such fraudulent alienations, as, from their importance, are reducible at common law. 3. That the bankrupt has been accessory to this dilapidation, either directly, or through the agency of others, whom he instigated to join him in the design. 4. That these acts were done with a fraudulent intent, and in the knowledge that the legal rights of creditors were thereby unjustly invaded.

At present, cases of fraudulent bankruptcy usually occur in regard to bankrupts who have been sequestrated, and who have embezzled their funds in contemplation of, or subsequent to, that event. The circumstances founded on in proof of guilt are usually of the following kind:—Concealment of goods in the houses of neighbours or associates, or under the floor, or in the roof of the bankrupt's own house or shop; sending them clandestinely away, under cloud of night, to

[1] Unreported. [2] 1 Hume, 509.

places of concealment; indorsing away bills or bonds to favourite creditors, on the eve of bankruptcy, and after insolvency was known to the bankrupt; alienations to conjunct and confident persons, in a state of insolvency, contrary to the act 1621; setting off for America, or the Continent, after bankruptcy, with funds covertly realized out of property which legally belonged to the creditors.[1] In the case of Noble, (1816,) the principal circumstance was, that he was taken at Liverpool with goods and money in his hands, to the amount of £430, with which he was about to embark for America;—he was convicted. In the case of Morison, (1817,) a sequestrated bankrupt, taken, in similar circumstances, with bills and money to the extent of £650, was convicted.[2] In the case of Dick and Lawrie, (16th July, 1832,) the libel charged the concealment of goods in contemplation of bankruptcy, and with intent to defraud creditors, but it did not state that the goods remained concealed at the period of bankruptcy, or that the creditors were actually defrauded. This was held a sufficient charge of fraudulent bankruptcy.[3]

In addition to the charge of fraudulent bankruptcy, it is competent to indict the bankrupt for the perjury contained in his statutory oaths; this was done in the case of Carter, 1831.

The punishment of fraudulent bankruptcy varies from imprisonment to transportation, according to the magnitude of the offence. Infamy, and ineligibility for office, are, in every case, superadded.

SECTION XXX.

BIGAMY.

BIGAMY is the wilful contracting of a second marriage during the known subsistence of a former.[4]—In the ordinary case, both marriages must have been by regular celebration, and not contracted merely by courtship and acknowledgment, or the like. If, however, the first marriage, though clandestine in the outset, has gradually assumed the character and consistence of a regular connexion, and the parties have lived together invariably in that way for a length of time, and if the second marriage has been by regular celebration, it is probable that bigamy would be held to have been committed.[5]

[1] Alison, 570-1.
[2] 1 Hume, 510.
[3] Unreported.
[4] 1 Hume, 459.
[5] Id. 459-61.

The *first* marriage must be lawful, and still subsisting. The crime is not committed, if the first marriage was unlawful, on account of near relationship, adultery, or the like; or if it was dissolved by divorce, (unless the divorce was obtained by the fraud of the accused, and is afterwards set aside;) or if the accused believed, on reasonable grounds, that the first marriage was dissolved by death.[1] In the case of Isabella Bain or Bell and John Falconer, (13th July, 1832,) the charge set forth, that the pannels had entered into a matrimonial connexion with each other, "both and each of you well knowing that the said John Bell, the lawful husband of the said Isabella Bain or Bell, was still alive." An objection to the relevancy of this charge was stated on the part of Falconer, inasmuch as it did not set forth his knowledge that Bain *remained the lawful wife of Bell, and was not divorced.* This objection was sustained.[2]—It is of no consequence that the *second* marriage is vitious and exceptionable, as, for instance, incestuous, or adulterous, provided it has been regularly celebrated.[3]

The second spouse and the priest are art and part of the crime, if they knew of the subsistence of the former marriage. The witnesses, also, are art and part, if they concealed the former marriage from the second spouse, or from the priest, who were ignorant of it. It is undecided whether the presence of the witnesses at the ceremony will implicate them, where all concerned are apprised of the true situation of things.[4]

The punishment of bigamy, at common law, is imprisonment; but, by statute 1551, c. 19, confiscation of moveables and infamy are superadded. In modern practice, it is not usual to libel on the statute. In the case of Isabella Bain and John Falconer, above mentioned, Bain was convicted, and imprisonment for three months awarded.

Evidence in Bigamy.

The extract of proclamation of banns, and the marriage certificate of the clergyman, in regard to both marriages, ought to be produced. The extract of proclamation, if it be regular, proves itself, in the same way as the extract of a previous conviction; but the application of it to the pannel must be established by parole evidence. The clergyman, if

[1] 9th Geo. IV. c. 31, sect. 22.
[2] Unreported.
[3] 1 Hume, 461.
[4] Id. 462.

he be alive, must swear to his certificate; or, if he be dead, some one who knows his hand-writing must prove it, and this is to be coupled with the testimony of the witnesses who were present at the ceremony. If it be proved that the extract of proclamation or certificate has been either destroyed or lost, or never existed, then the next best evidence of which the case will admit may be received, and will be deemed sufficient, arising from the testimony of the persons present at the marriage; or, if these are dead, of those who knew, by report, that the parties were married, and lived openly as man and wife. In conformity with the general rule, it would seem that the first wife is an inadmissible witness against her husband to prove the first marriage.[1] As the second marriage is null, there can be no objection to the admissibility of the second wife against the husband, but to render her unobjectionable, a foundation must be laid by proving the first marriage in the first instance. When both marriages are proved, and also the existence of the first wife at the time of the second marriage, the presumption of law is, that the pannel was aware of the impediment to his entering into the second contract; and this presumption he can only elide, by shewing such circumstances as might, on reasonable grounds, warrant him in concluding that the first contract was dissolved.[2]

SECTION XXXI.

CLANDESTINE MARRIAGE.

THE offence of celebrating clandestine marriages consists in the contracting of marriage, or performing the ceremony, in a religious form, without the observance of certain particulars required by statute.[3] These particulars are twofold; —(1.) The first is, that the celebrator of the marriage must be a clergyman duly authorised by the church, that is, one who is regularly called to the pastoral functions within Scotland. The crime is, therefore, committed, if the celebrator be a deposed minister of the Established Church, or the pastor of an Episcopal meeting, whose orders are not from an English or Irish bishop, or who has omitted to produce and record his orders, or to take the oaths to Government.[4] But

1 2 Hume, 349.—Burnett, 433.—The same rule holds in England:—1 Hale, 693.—1 East, 469.—1 Russell, 207.
2 Alison, 510-1. 3 1661, c. 34. 4 1 Hume, 464.

no criminality attaches to a member either of the English, or any other dissenting church establishment, if he be in orders, and subject to no disability, according to the forms of his own persuasion. Of course, the crime is committed, where the celebrator, as usually happens, has no pretensions to the character of priest or pastor, but is a mere impostor, who has audaciously assumed the office of a clergyman. According to the custom of Scotland, marriage is valid, as a civil contract, by the mere exchange of the matrimonial consent. There is nothing illegal, therefore, in a magistrate, or even a private individual, being called upon, in a civil capacity, to witness the interposition of that consent; the irregularity begins if he goes a step farther, and officiates as a clergyman would, by praying on the occasion, pronouncing the nuptial benediction, reading the service of the church of England, or the like.[1]—(2.) The second particular required by law, to constitute regular marriage, is the previous proclamation of banns—and this holds, whatever may be the quality of the person officiating. In a charge, founded on the want of this requisite, if the prosecutor proves the celebration, and that no certificate of banns was produced, he has established his case, and lays upon the accused the burden of proving that proclamation was duly made. If a false certificate of proclamation have been produced, this will ordinarily be a sufficient excuse to the clergyman; but if he be privy to this wrong, he is not only punishable for the irregular celebration, but, according to the extent to which he has gone, may be considered as art and part of the falsehood and abuse of trust by the session-clerk, for which that person is punishable. It hardly appears that the celebrator will be exculpated by the mere false affirmation of the parties, without production of a certificate, (to which alone he ought to trust,) unless he can prove that he was truly over-reached.[2]

These appear to be the only statutory modes of the offence; but the common law seems of itself to be adequate to repress some of the higher abuses of this kind, if they are conducted in such a manner as to bring them under any of the other and larger denominations of crime. Thus, in the case of Craighead, (1750,) it was a separate article of charge, and was laid on the common law, that he had assumed a fictitious name, and the character of clergyman, and under these had married and given certificates of marriage.[3]

Certain penalties are denounced by the statute against the

[1] 1 Hume, 465. [2] Id. 466. [3] Id. 467.

parties and witnesses in clandestine marriages; but the celebrator alone has ever been prosecuted in a criminal court. The punishment of the celebrator is that prescribed by statute, viz. banishment from Scotland for life, but in some cases imprisonment has been awarded, with a shorter period of banishment.

SECTION XXXII.

INCEST.

INCEST is the crime of carnal intercourse between persons within certain degrees of relationship. The forbidden degrees are those contained in *Leviticus*, c. xviii.;[1] viz. Parent and child; grandfather and grand-daughter; brother and sister, whether uterine or consanguinean; nephew and aunt, whether by father or mother; uncle and niece; father and daughter-in-law; son and stepmother; father and step-daughter; husband and wife's grand-daughter, either by her son or daughter; brother and brother's wife; there are doubts as to brother and brother's *widow;* husband and *living* wife's sister; there are doubts as to husband and *dead* wife's sister; woman and husband's nephew by his brother; man and grand-aunt by affinity. Illicit commerce with two brothers or sisters is not incest, but it is probably cognisable by a criminal court. With regard to bastard relations, intercourse between a mother and son is incest; but it seems to be otherwise in regard to the more distant degrees. It is essential to the crime that the accused knew of the relationship; but if he alleges ignorance, it lies with him to prove this defence. The proof of actual intercourse must be as clear as in cases of rape. The guilty paramour may be adduced as a witness, as in any other case of *socius criminis*, but such testimony is to be relied on with caution. The punishment of incest is capital. The attempt to commit the crime is punishable arbitrarily.[2]

Sodomy and *Bestiality* are capital crimes. The attempt to commit these offences is punishable arbitrarily.[3]

[1] 1567, c. 15. [2] 1 Hume, 446-52. [3] Id. 469.

SECTION XXXIII.

HIGH TREASON.

HIGH TREASON includes all offences more immediately directed against the person and government of the king, and which amount to a violation of the allegiance due to him.[1] The English law on this subject was substituted for the Scottish, at the Union: it rests chiefly on the statute 25th Edward III. c. 2.—(1.) It is high treason to "compass or imagine" the death of the king.[2] The crime is therefore committed, not only by killing the king, but by conceiving the purpose of doing so. Such purpose must, however, be manifested by some *overt act*, established by sufficient proof. The following overt acts are sufficient to demonstrate the purpose:—To assemble, and consult on the means of killing the king, though no resolution be come to; to instigate or encourage any one to take away his life;[3] to compass or intend *any bodily harm*, tending to the death of the king;[4] to march with a warlike force against him; to fortify a place to resist his power; to take measures to imprison him, or to depose him from the throne; to enter into a conspiracy to levy war against him, to compel him to change his measures; to solicit any foreign power to invade the realm.[5] A writing not published or uttered, if purely speculative, and without relation to any treasonable practice in contemplation at the time, is not a sufficient overt act. The rule is different in regard to an unpublished writing which has relation to an existing or contemplated treasonable act. A published writing which argues for the lawfulness, not of killing kings in general, but of killing our king in particular, upon grounds applicable to the situation of the country, seems to be a sufficient overt act.[6] Words spoken against the king, without relation to any particular design, as curses, or invectives against him, or even threats of mischief, do not constitute an overt act; but the case is different if there be an act or deed to which the words refer, and which they serve to explain.[7] With regard to the queen and prince, the compassing or imagining their death is held to be demonstrated only by direct attempts to kill them, and not by the more remote acts applicable to the king.[8] (2.) By statute 36th Geo.

1 1 Hume, 512. 2 25th Ed. III. c. 2. 3 1 Hume, 514.
4 36th Geo. III. c. 7, made perpetual by 57th Geo. III. c. 6.
5 1 Hume, 514. 6 Id. 517. 7 Id. 519. 8 Id. 520.

III. c. 7. the compassing or intending to depose the king,—or to levy war within the realm, to compel a change of measures, or constrain Parliament,—or to move any foreign power to invade the realm, are substantive acts of treason. These acts, as has been already seen, are also sufficient overt acts, on a charge of compassing or intending the king's death. (3.) It is treason to levy war against the king within the realm,[1] as by assembling an armed force against his power; or by a multitude, though not in warlike array, proceeding illegally to execute some enterprise of public concern. Under this description falls an insurrection for reforming the established law, religion, or political constitution of the land; an insurrection to obtain redress of national grievances, whether real or imaginary; to pull down all prisons, and courts of justice; to throw open all inclosures; to raise all wages of labour; to hinder the collection or payment of all taxes. The construction is different, where the object is of a special and local kind, and does not involve any general plan of hostility to the state, as to throw open a certain common, to pull down a certain jail, to hinder the execution of a certain criminal.[2] It may be observed in regard to these constructive modes of levying war, which have no immediate relation to the person or government of the king, that the bare conspiracy to engage in them is not an overt act of compassing the king's death, as it is where the intended war is to dethrone or restrain the king, or to have any power over him.[3] (4.) It is treason to adhere to the king's enemies within the realm,[4] as by sending them provisions or warlike stores, giving them intelligence, taking an oath of fealty or allegiance to them, or the like.[5] It is not a treasonable adherence to assist prisoners of war in this country to escape, but it is an indictable offence at common law.[6] The adherence may be by aid and comfort given to the enemy, either within the realm or elsewhere. It seems not to be material whether the acts of adherence are committed directly against the king's forces, or against his allies carrying on war against the common enemy.[7] (5.) It is treason to violate the queen, the king's eldest daughter unmarried, or the wife of the king's eldest son, whether with or without their consent.[8] (6.) It is treason to counterfeit the great or privy seal;[9] or the seals appointed by the Articles of Union to be kept in Scotland;[10] or

1 25th Ed. III. c. 2.
2 1 Hume, 523-6.
3 Id. 526-7.
4 25th Ed. III. c. 2.
5 1 Hume, 527-8.
6 Ibid.
7 Foster, p. 220, No. 12.
8 25th Ed. III. c. 2.
9 Ibid.
10 7th Anne, c. 21, sect. 9.

to forge the sign-manual, privy signet, or privy seal.[1] (7.) It is treason to kill the chancellor, treasurer, or certain judges in England;[2] or any *of* the lords of Session or Justiciary in Scotland, sitting in judgment.[3]

In treason there are no accessaries, either before or after the fact, but all are principals.[4] Treason may be committed by all persons who owe allegiance to the king; and under that description are included all natural-born British subjects, and all aliens, while residing here at peace.[5]

Trial for treason is conducted according to the forms of the English law. It is competent to any commission of *oyer and terminer*, issued in favour of such persons as his Majesty may appoint, under provision that three of the lords of Justiciary be in such commission, whereof one to be of the quorum. It proceeds upon a bill found by a grand jury, according to the forms of the law of England. The petty jury, or assize to try the cause, consists of *twelve* persons, instead of the ordinary number of fifteen. By statute 6th Geo. IV. c. 22. the counties of Scotland are united into certain districts in regard to trials for treason, and in regard to the return of jurors by the sheriffs for such trials.

The punishment of treason is drawing on a hurdle, hanging till dead, beheading and quartering, forfeiture of moveables, honours, and estate for ever, and corruption of blood.[6]

Evidence in High Treason.

By the law of England, in ordinary cases, the testimony of *one* credible witness is sufficient to warrant conviction. But in cases of treason, *two* witnesses are necessary.[7] If, however, the treason is to be established against the prisoner by his accession to two or more overt acts, it is sufficient if there is one good witness to each overt act. In such case, however, the acts must be of the same sort of treason, so as to cohere in some measure, and strengthen each other. Thus, if one witness swear that a letter was written to provide arms for an attempt on the king's life, and another, that the prisoner lay in wait to kill the king, both these overt acts of compassing the king's death are sufficiently proved. But, if

1 1 Mary, St. 2. c. 6.—Formerly, certain offences against the coin were treason; but this has been altered by statute 2d Will. IV. c. 34.—See before, p. 151.
2 25th Ed. III. c. 2. 3 7th Anne, c. 21. sect. 8. 4 1 Hume, 533.
5 Id. 534. 6 Id. 544. 7 7th Will. III. c. 3.

one witness swear that the prisoner lay in wait to kill the king, and another, that he cruised at sea, under an enemy's commission, this is not sufficient, because the one is an act of compassing the king's death, the other an act of adherence to his enemies. In all cases, minor and collateral facts, though of great importance to the matter at issue, may be proved by a single witness, as, for example, that the prisoner was a native-born subject, and not an alien; that he was at a particular place, at a particular time; that he was dressed or disguised in a particular manner.[1] It appears, therefore, that the English law of treason has been brought to precisely the same standard as the Scottish law, in regard to ordinary crimes, viz. that each charge must be substantiated either by two direct witnesses, or by a chain of circumstances, each link of which may be substantiated by a single credible testimony.—In regard to direct attempts to kill the king, the common law of England as to evidence has been restored.[2] In such a case, therefore, conviction may proceed on the evidence of a single witness.[3]—No evidence is receivable of any overt act not specified in the indictment, but if it tend to establish such overt acts as are specified, it may be received to that effect.[4]

Misprision of Treason.—Misprision of treason is the being in the knowledge of an act of treason, and failing to reveal it to some judge of assize, or justice of the peace. The offender will be held as a principal, if the concealment is accompanied with any probable circumstance of assent, as, the receiving and comforting a traitor, or the like.[5]

SECTION XXXIV.

SEDITION.

SEDITION comprehends all those practices, whether by deed, word, or writing, or of whatever kind, which are suited and intended to disturb the tranquillity of the state, to produce public trouble and commotion, and to move the subjects to the dislike, resistance, or subversion of the established government, and the settled order of things.[6] It is distinguished from treason in this respect, that it does not aim at direct and open violence, either against the laws or the life of the sovereign, but at the dissemination of such a turbulent spirit as is calculated ultimately to produce such vio-

1 1 Hume, 540.
2 39th and 40th Geo. III. c. 93.
3 1 Philips, 150. 5th Ed.
4 7th Will. III. c. 3.—1 Hume, 543.
5 1 Hume, 551.
6 Id. 553.

lence.[1] It is extremely difficult to define with precision in what sedition consists, because it is evident that the same language or publications which are calculated at one period to stir up immediate dissension, may be diffused at another without any danger. The particular situation of the country at the time is, therefore, always to be taken into consideration, in judging of offences of this kind. It is undoubtedly sedition to maintain that the power of the Crown, of the Lords, or of the People, has become overgrown, and ought, at all hazards, and by illegal means, to be retrenched; or to exhort the people to constrain the legislature by illegal means, as by refusing to pay taxes, or by assembling together to elect a new parliament; or to revile and scoff either at the royal person, or either branch of the legislature, in such a manner as is calculated to excite ultimate rebellion.—Sedition is sometimes nearly connected with mobbing.[2] The riots produced by the embodying of the militia in 1797, were all charged as mobbing and rioting, aggravated by being connected with a design to prevent the execution of a public law.—The punishment of sedition is, for the first offence, fine or imprisonment, or both; and for the second, the same, or banishment, for such time as the Court shall appoint.[3]

The establishment of seditious societies, or the administering or taking of unlawful oaths, or engagements towards any seditious or mutinous object, is punishable with transportation for seven years.[4] The *administering* of an oath towards the commission of treason, or of any capital crime, is punishable with death; the *taking* of such oath is punishable with transportation for life.[5] Under both these statutes, if the pannel pleads that he was compelled to take the oath, such plea will not avail him, unless it appear that he gave information of the oath to a justice of peace, or one of the secretaries of state, within fourteen days after taking the oath. Societies are declared to be unlawful, the members of which take unlawful oaths or engagements; or where the names of some of the members or office-bearers, or persons forming committees, are kept secret from the society at large; or where there are divisions or branch-societies acting separately from each other.[6] Meetings for the purpose of military exercise, without legal authority, are unlawful, and persons attending such meetings are liable to transportation for seven years.[7]

[1] Burnett, 259.
[2] See before, p. 167.
[3] 6th Geo. IV. c. 47.—The publication of blasphemy, or of statements denying the existence or attributes of God, or the authority of the Holy Scriptures, is a cognisable offence, and punishable with fine and imprisonment.—1 Hume, 568.
[4] 37th Geo. III. c. 123.
[5] 52d Geo. III. c. 104.
[6] 39th Geo. III. c. 79.
[7] 1st Geo. IV. c. 1.

CHAPTER II.

CRIMES CONSIDERED IN REFERENCE TO THEIR INDIVIDUAL CIRCUMSTANCES, AS SET FORTH IN THE CRIMINAL CHARGE.

We have now explained the nature and qualities of the different crimes to which evidence has to be applied. But it is necessary to observe farther, that the *individual circumstances* of crimes must be taken into view by the jury, as well as their general qualities; in other words, the evidence must be applied to those qualities which distinguish one *act* of the same kind of crime from another, in the same way as it is applied to those qualities which distinguish one *species* of crime from another. A prisoner is called to answer, not for having committed a crime generally, but for having committed *a particular act* of crime, in a certain way, and at a certain time and place; and in order to warrant conviction, therefore, it is necessary to prove the commission of that act, together with the various circumstances which have been alleged and set forth in the charge, as distinguishing it from all other acts of the same kind. Thus, for instance, in a case of murder, though it should be sufficiently proved by the evidence that a murder had been committed, and that the prisoner was the perpetrator of it, still, if it appeared that it had been committed under circumstances differing materially from those set forth in the charge—and so set forth in order to distinguish the act from all others—the prisoner would be entitled to acquittal.—Before entering farther into this part of the subject, it will be necessary to give some account of the libel, in which the charge is contained, and also of the modifications which may take place on it in the course of the trial.

SECTION I.

CRIMINAL CHARGE, OR LIBEL.

There are two kinds of libel;—Indictment, and Criminal Letters.—An indictment, in point of form, is an address to the pannel, in name of the prosecutor, narrating the charge against him, and concluding for punishment; and it is sub-

scribed by the prosecutor:—"A B, you are indicted and accused at the instance of C D, his Majesty's advocate, for his Majesty's interest, that albeit by the laws of this, and of other well-governed realms, murder is a crime of a heinous nature, and severely punishable. Yet true it is," &c., and then the particulars of the act are set forth. In this form of procedure, the pannel, witnesses, and assizers, are cited under the authority of letters of diligence, which pass under the signet of the Court,—a warrant to prepare these letters being obtained by an application to the Court at the instance of the prosecutor.[1]—The style of criminal letters is similar to that of a summons in a civil action. They proceed in name of the King, and set out with a salutation to macers or other executors of the law; they narrate the charge made against the prisoner, and conclude with his Majesty's *will*, or command, for summoning the person accused, witnesses, and assizers, in order for trial. Criminal letters pass the signet of the Court, under a warrant obtained on the application of the prosecutor.[2]—By custom, the process by indictment belongs exclusively to the Lord Advocate, as public prosecutor, though the party injured may have his name associated with his lordship's as joint prosecutor. The form of criminal letters is adopted where the private party pursues, which must always be with concourse of the Lord Advocate. Generally an indictment is used where the offender is in custody—criminal letters, where he is at large; but this rule is not essential, nor always observed.[3]

The form of setting forth the criminal charge is the same in these two kinds of libel—namely, a syllogistic form. The leading proposition, or *major*, states the appellation of the crime meant to be charged, or, if it have no proper name, describes it at large, and characterises it as a crime that is severely punishable. The *minor* proposition avers the pannel's guilt of this crime, and supports this averment with a narrative of the fact alleged to have been committed; and the *conclusion* infers that, on conviction, he ought to be punished with the pains of law applicable to his offence.

Major Proposition.—The libel is laid on common law where the major proposition makes reference simply to the laws of this and other well-governed realms, without particular allusion to any statute. Under this form, however, the prosecutor is not precluded on the trial from referring to statutes, and availing himself of their provisions as to the

[1] 2 Hume, 153. [2] Id. 154. [3] Id. 154-5.

crime charged. It is usual, however, in present practice, and is more equitable, when advantage is meant to be taken of a statute, to libel upon it expressly, by stating the words of the enactment, and this is more especially true, where the statute is one of modern date, and introduces any thing to the prejudice of the pannel, and beyond, or at variance with, the common law. It is done in this form, after the appeal to the common law, "And more particularly, whereas by an act passed in the 49th year of the reign of his Majesty King George III. chapter 14th, entitled, An act, &c. it is enacted," &c. and here the words of the enactment are recited.[1] A libel drawn in this way contains a double charge,—of a crime at common law, and of a statutable crime; and to this the jury must attend, in considering the application of the proof. In some cases the charge is laid entirely on statute, without any reference to common law. It may be remarked, that the major proposition does not set forth the special punishment of the offence, except when a statute is libelled on which assigns a special punishment.

Where there is any doubt as to the nature of the crime, as, for instance, whether it is theft or reset, the practice is to set forth both of these crimes in the major proposition, and to charge the prisoner, in the minor, alternatively, as guilty of one or other of them. In this way, a verdict of guilty may be obtained, whether the crime appear in evidence to be theft or reset. Where the doubt lies between two crimes of the same generic kind, the usual course is to charge the lower denomination absolutely, and subjoin the other circumstances as aggravations of it. Thus, in a case of parricide, the charge is in this form:—"Murder, *especially when committed on the person of one's own parent.*" The fundamental crime, and the aggravation, are thus kept distinct, and the prisoner may be found guilty of the former, though the latter should be found not proven. In this way, likewise, circumstances may be charged which aggravate the principal fact, though they do not raise it into a crime of a higher denomination. Thus, assault may be charged in this form:—"Assault, *especially when committed to the effusion*

[1] In the case of William Hardie, (24th January, 1831,) charged under 10th Geo. IV. c. 38, with having discharged a loaded gun at John Boiles, whereby he was seriously wounded to the effusion of his blood, the indictment, in libelling on the statute, did not quote the whole section founded on, but a part of it only; and some of the Judges having expressed doubts how far the libel in such circumstances was good, the Lord Advocate passed from the statutory charge, and adhered simply to that at common law.—Unreported.

of blood, and danger of life;" and theft may be charged:—"Theft, *especially when committed by a person habite and repute a thief.*" In such cases, a failure to prove the aggravating quality does not affect the principal charge. The case is different, where the aggravating quality is not charged as a separate matter, in the form above mentioned, but as an inherent portion of the fundamental fact, as where the charge is "Assault *with* intent to ravish." Accordingly, in such a case, it has been found, that a verdict, finding guilty of the assault, but not guilty of the intent to ravish, is bad.[1]

Several criminal acts may be charged in one libel, if they are of one class and general description, or, though of different kinds, if they have a natural relation as parts of one story, as robbery, deforcing officers of justice, and jail-breaking. Sometimes charges have been combined in one libel, though little, if at all, connected.[2]—Several pannels may be charged, upon the same libel, for the same fact or set of facts. But if it appear that any of them are thus subjected to disadvantage, by being deprived of the evidence of the others, the Court will separate the trials.[3]—Several pannels may be charged in the same libel with separate crimes, provided there is a connexion between the pannels or the crimes. Thus, on the same libel, A may be charged with theft, and B with resetting the stolen goods.

Minor Proposition.—The minor proposition sets out with a general affirmation of the prisoner's guilt, and this affirmation it then proceeds to substantiate by a narrative of the alleged criminal act. This narrative is called the *subsumption.*

To make a good subsumption, it is necessary that it narrate facts which amount to the crime of which the prisoner is said to be guilty. Thus, if the charge is robbery, and the subsumption relate facts which amount only to theft, the libel is bad.[4] It seems to be sufficient, in certain cases, if the facts amount to a lower crime of the same class, for instance, if they amount to assault, where the charge is hamesucken; or culpable homicide, where the charge is murder; provided the prosecutor restricts his charge to the lower species of crime.[5]

It is farther necessary that the subsumption give such a specification of the manner, time, and place of the alleged criminal act, as may distinguish it from all others of the same species, and inform the prisoner sufficiently of what is to be

[1] 2 Hume, 449.—Syme, 137. [2] 2 Hume, 171-2. [3] Id. 175.
[4] Id. 181. [5] Id. 184.

proved against him.—It must specify the *manner* in which the act was done. In robbery, for instance, the things taken, and the sort of violence, must be stated. This is not necessary in cases where the fact cannot be ascertained, as in fire-raising, where it is often unknown by what contrivance, or in what part of the building, the fire was raised ;[1] in child-murder, where the nature of the violence is frequently unknown ; and in some other cases of murder, where, from the progress of decay, or otherwise, the body is so much disfigured, as to make it doubtful in what manner death was occasioned.[2]—Where there is doubt as to the weapon used in the murder, an alternative may be introduced of "some other instrument to the prosecutor unknown." In housebreaking, likewise, after stating the manner of entry, as it is understood to have taken place, the alternative may be introduced, "or by some other means to the prosecutor unknown." This is meant to guard the prosecutor against the risk of inaccurate information as to particulars which do not affect the substance of the charge.—The *person* injured must be set forth, especially in the case of crimes against the person, such as assault, or murder. This is dispensed with, where the fact cannot, from the nature of the case, be ascertained, as in the murder of an unknown stranger, or in piracy committed against a foreign and unknown vessel.[3] The same rule holds as to all crimes which have any relation to persons, as bribery, subornation, bigamy. In these, there must be a specification of the persons with, or against, whom the pannel acted.[4] In a charge of theft, the person, out of whose possession the stolen goods were taken, must be specified. Though usual, it is not, perhaps, essential to specify the *proprietor* of the stolen goods. It is the state of *possession* that qualifies the theft, and that being set forth, the act is sufficiently distinguished.[5]—The nature of the things stolen must be specified. Where the articles are numerous, this is sometimes done in an inventory attached to the libel, and to which the libel makes reference. In a charge for stealing cattle, it is sufficient to specify the kinds of cattle stolen, as horses, oxen, &c., and the number of heads of each kind.[6] In a theft of money, it is sufficient to state the sum, "or thereby ;" and the species of money generally. It is not necessary to affirm how much was taken in bank-notes, and how much in coin, but simply that these were the two kinds of money of which the sum consisted.[7] Watches are sufficiently described by their

[1] 2 Hume, 192. [2] Ibid. [3] Id. 198.
[4] Id. 199. [5] Id. 200. [6] Id. 202. [7] Ibid.

metal, as gold, silver, &c.; bales of cloth by the quality, as woollen cloth, drugget, shalloon, &c.; and, in such a case as the latter, the words are sometimes introduced, "or other the like goods," which is intended to guard the prosecutor against any trifling inaccuracy in the description of the goods.[1] In fire-raising, riot, and such like crimes, a greater latitude is allowed to the prosecutor in describing the property stolen or destroyed. In such a case, it is sufficient to state that the whole furniture, books, and clothes, or greater part thereof, contained in the house of A, most of which were the property of B, were stolen. In cases of such a nature, the guilt does not attach much to particulars, but consists rather in the general train of proceedings, in which the theft, or destruction, of the special effects is an incident only.[2] On the other hand, forgery, bribery, perjury, subornation, and some others of a complex and delicate nature, must be set forth with a full detail of the material circumstances of the fact.[3]—Not only must the manner of the crime be set forth, but also the *place* and *time*. It is only by being informed as to these matters, that the prisoner can manage his plea of *alibi*, which depends on a comparison of places and times.—The *place* must be expressly mentioned, and not left to be inferred from the other circumstances set forth.[4] It is enough, if the place be described with as much precision as the circumstances of the situation will allow, and so as not to embarrass or perplex the pannel.[5] It is not necessary to mention the *parish* in which the place is situated, if the place is a noted one, or is otherwise sufficiently described.[6] The rule as to place is relaxed in cases where the specification of that circumstance is immaterial, or where it cannot be known to the prosecutor with certainty. In cases of forgery, for instance, it is not necessary to mention the place where the impressions were thrown off, or the signatures attached. It is otherwise with regard to the place of uttering, which is an overt act, and that which completes the crime of forgery, and brings it within the cognisance of the law.[7] The same observations apply to the crime of writing and uttering an incendiary letter.[8] A charge of reset is sufficient, though the goods are stated to have been received at some place to the prosecutor unknown; because the crime of reset consists in the *possession* of the goods,

[1] 2 Hume, 204-5. [2] Id. 205.
[3] Ibid.—In regard to forgery, it is provided by statute 2d and 3d Will. IV. c. 123, § 3, that it is not necessary to set forth in the libel a copy of the forged writing, but merely to describe the same in such a way as would be sufficient to sustain a libel for theft.
[4] 2 Hume, 209. [5] Id. 213. [6] Ibid. [7] Id. 214. [8] Id. 217.

and the place of receiving is not material.[1] From the nature of the crime, indulgence is given in charging the *place* in acts of piracy.[2] The rule is also relaxed in crimes which have a series of proceedings, from the whole of which the offence is inferred, as, for instance, cases of treason, consisting in open and continued hostility.[3] A charge having relation to the pannel's character, or course of livelihood, as a charge of habite and repute in theft, requires no specification of place.—The charge as to *time* is now generally extended to a period of three months, being laid as for one of the days of a certain month, or of the month immediately preceding, or of the month immediately following.[4] Relaxation is allowed, in charging time, in nearly the same cases in which it is allowed in charging place.[5] In reset, it is sufficient to state the time of the theft, and of the discovery of the goods in the pannel's possession, without specifying the time of his receiving them.[6] Latitude in charging time is allowed in the case of a servant or store-keeper pilfering, occasionally and at intervals, the goods under his charge; in cases of forgery, so far as regards the *fabrication* of the forged writing; in cases employing a tract of time; and in cases where a considerable period has elapsed between the perpetration of the crime and the trial.[7] In the case of Alexander Grigor, (Inverness, 27th April, 1832.) the libel charged, *inter alia*, the theft of a certain article, "on one or other of the days of one or other of the months of April, May, and June, 1831, *or at some other time in the course of the year* 1831." On an objection by the pannel to this latitude in point of time, the charge was limited to the three months specified.[8]

By statute 1592, c. 153, all criminal libels must contain a charge of art and part.[9] This charge includes all the less immediate degrees of guilt in which one is involved who is concerned in occasioning, preparing, or facilitating, the criminal deed, or in approving of, or ratifying it, after it is done. It includes also all assistance and interference in the act itself, at the time of perpetration, by which the person thus concerned is not an accessary, but a principal offender.[10] It is applicable, moreover, even to the case of a simple and indivisible act, executed, and so charged in the libel, by one per-

[1] 2 Hume, 217. [2] Ibid. [3] Id. 217-18.
[4] In this form, "In so far as, upon Monday the 5th day of November, 1832, or on one or other of the days of that month, or of October immediately preceding, or of December immediately following, within the house," &c.
[5] 2 Hume, 221. [6] Ibid. [7] Id. 222-3. [8] Unreported.
[9] Said to be a corruption of the Latin phrase, *artifex et particeps*.
[10] 2 Hume, 225.

son only, without company or assistance;[1] and in such a case it warrants conviction, though it should turn out that the deed was not done by the pannel, but by another at the pannel's command.[2] The prosecutor is thus secured against all such variations of his proof from the libel, with respect to the manner of doing the deed, as do not alter or take away the fundamental fact charged.[3] Under the charge of art and part, the prosecutor is freed from the necessity of setting forth the mode of the pannel's accession, or the detail of the presumptions against him. Thus, with regard to a crime committed by a number of persons, it is sufficient to relate the substantial fact, and charge it alternatively against the pannels, without setting forth, with respect to them severally, how they are art and part, or from what circumstances their concern in the deed is inferred; they are sufficiently accused of the crime, by a general charge of art and part, of whatever kind their accession may be.[4] The charge of art and part is made at the outset of the minor proposition,—"Yet true it is, and of verity, that you, the said A B, are guilty of the foresaid crime, actor, *or art and part*."[5] This charge is applicable to every libel, even though laid on a British statute creating a new offence.[6]

When several offences are charged in one libel against several persons, they ought to be duly separated in the narrative, so that each pannel may know with certainty what he is accused of.[7]—At the close of the minor, warning is given to the pannel of the articles to be produced in evidence against him. These are sometimes inserted in an inventory, to which the libel bears reference.[8]

Conclusion.—The conclusion of the libel is in these terms:—"All which, or part thereof, being found proven by the verdict of an assize, before the Lord Justice-General, Lord Justice-Clerk, and Lords Commissioners of Justiciary, you, the said A B, ought to be punished with the pains of law, to deter others from committing the like crimes in all time coming." The meaning of the words, "or part thereof," is, that the pannel shall be convicted on evidence of such parts of the libel as shall be relevant to establish his guilt.[9] The pains concluded for are simply "the pains of law," the determination of these being, of course, the province of the Court.

[1] 2 Hume, 227. [2] Id. 228.—See below, p. 201.
[3] 2 Hume, 236. [4] Id. 237.
[5] This charge was, in former practice, repeated at the close of the minor proposition, but this is now dispensed with by statute, 9th Geo. IV. c. 29, § 9.
[6] 2 Hume, 239. [7] Id. 240. [8] See before, p. 26. [9] 2 Hume, 241.

SECTION II.

MODIFICATION OF LIBEL.

SUCH, then, is the nature of the criminal charge upon which the prisoner is brought into Court. It is proper, however, to remark, that the charge, as it stands in the libel, may, in some respects, be modified in the course of the proceedings; and to these modifications, where they occur, the jury ought carefully to attend.

Where the libel contains several charges, or several pannels, the Court, if they see cause, may parcel out the libel, and proceed to the trial of as many of the articles, or pannels, in the first instance, as they may think proper, reserving the others for trial afterwards. The prosecutor, in like manner, may depart from one or more of the charges against one or more of the pannels, and proceed with his proof as to the others. Thus, it sometimes happens, in cases of theft, that the prosecutor departs from his charge in regard to certain of the alleged stolen articles, and insists as to the others. In the case of Alexander Martin, (14th July, 1824,) the libel bore a charge, *inter alia*, of stealing a number of coins contained in a small bag. The person from whom the property had been taken, in giving his evidence, pointed out several of the coins produced as not having belonged to him, and thereupon the prosecutor limited his charge to the remainder.[1] Where one charge of a libel is found irrelevant by the Court, the prosecutor may either crave a desertion of the diet, which has the effect of delaying the trial, or he may proceed to trial with the remainder of the libel, provided the excision of the irrelevant parts has not impaired the relevancy of the remaining charges. Where a libel contains a charge of a crime at common law, and of a statutable crime, the prosecutor may abandon either of them, and insist on the other; and the Court, in like manner, if they think the statute inapplicable, may find the statutable charge irrelevant, and sustain the charge at common law. In like manner, where a crime is charged with aggravations, the prosecutor may depart from the aggravations, and insist merely as to the unaggravated crime. In some cases, the prosecutor is entitled to restrict his charge and conclusions to a lower crime than that set forth in the libel, provided it be of the same generic kind.[2] Thus, it is

[1] Unreported. [2] 2 Hume, 194.

settled, that, in a charge of murder, he may restrict the libel to a charge of culpable homicide. The reason of this is, that the pannel is bound to prepare himself as to all the degrees of guilt in the matter libelled, of a kind inferior to the charge set forth.[1] It may be added, that the prosecutor is likewise entitled to restrict the *pains of law*; that is, in a case punished capitally, he may abandon the capital punishment, and insist for one of an inferior kind only, it being left to the Court to determine what that inferior punishment shall be. Where a statute is libelled on, he may depart from the capital and statutable punishment, and yet adhere to the statute with respect to the description of the crime, and other circumstances of the charge.[2]

Generally speaking, the prosecutor is not entitled to alter or amend his libel at the bar, without the permission of the pannel.[3] In some instances, amendments, *by way of retrenchment*, have been permitted, without the consent of the pannel. In the trial of Edward M'Caffer and others, (Glasgow, September, 1823,) the prosecutor moved, before the pannels pleaded to the indictment, that the words, "parish of Gorbals and," in the description of the *locus delicti*, should be struck out of the indictment. This was allowed. In the case of Philip Murphy and others, (Glasgow, September, 1826,) for robbery, the words, "a native of New Zealand," which formed part of the description of the person robbed, were allowed to be struck out.[4] In the case of Henry Gillies, (Glasgow, September, 1825,) for hamesucken, the pannel's copy of the *criminal letters* charged the act to have been done "with *your* hands," which, it was argued, must mean the hands of the officers, to whom, by their style, the letters were addressed. The prosecutor moved that the words, "with your hands," should be struck out of the libel, and to this the Court acceded. But as it appeared that a second charge in the libel (in which the prisoner was said to have struck "in manner *above described*") would have been destroyed by this retrenchment, the prosecutor ultimately moved for a desertion of the diet.[5] In the case of John Law, (13th July, 1824,) for falsehood and fraud, an aggravation was charged of previous conviction, followed by imprisonment "in the *tolbooth* of Edinburgh." The prosecutor moved to have these last words struck out, as the imprisonment had, in point of fact, taken place in the *bridewell* of Edinburgh. This amendment the Court held incompetent, but only on the ground

1 2 Hume, 185. 2 Id. 168. 3 Id. 230.
4 Ibid. 5 Unreported.

that an interlocutor, finding the libel relevant, had been already pronounced.[1]

It is necessary, also, in reference to the charge as it stands in the libel, to keep in view the nature of the pannel's plea, and of his special defences, if any are proponed for him. The pannel's plea must be either guilty or not guilty. Where the plea of guilty occurs, the case is not now, as formerly, remitted to a jury, but sentence is forthwith pronounced by the Court.[2] In pleading not guilty, the pannel is not always to be understood as denying the whole allegations of the libel. Thus, in a case of murder, he may plead not guilty, and yet admit the homicide, but with the addition of self-defence as a justification of the act, by which his plea, taken complexly, is, not guilty of the crime libelled.[3] The pannel may plead guilty to certain charges of the libel, and not guilty to others; and in such a case, the prosecutor may either rest satisfied with the plea of guilty, so far as it goes, or proceed to prove the charges that are denied. Where a crime is charged with aggravations, the prisoner may plead guilty of the crime, and not guilty of the aggravations; and the prosecutor, if he thinks proper, may go to trial in regard to the latter. The prisoner, however, cannot plead guilty of the aggravations, and not guilty of the crime, because the former are merely appendages of the latter, and can have no existence apart from it. Where the pannel has a special defence to maintain, the particulars of it ought to be stated to the Court, immediately after he has entered his plea of not guilty to the charge, and where a written defence has been given in, it falls to be read by the clerk of Court at the same stage of the proceedings. It sometimes happens that this statement of the pannel has a considerable effect on the charge, as set forth in the libel. In the case of William Drover, (Glasgow, January, 1831,) for the murder of his wife, the libel charged the murder to have been committed, at a certain time, by beating the deceased, but said nothing of previous ill-usage. In his written defences, the pannel denied the murder, and added, that *he had never, at any time, been guilty of maltreating his wife.* Under this statement, the Court held it competent for the prosecutor to prove previous ill-usage, though this would not have been competent simply upon the libel.[4]

[1] Unreported.
[2] 9th Geo. IV. c. 29, sect. 14.
[3] 2 Hume, 282.
[4] Unreported.

SECTION III.

PROOF OF THE CIRCUMSTANCES OF THE CRIME, AS SET FORTH IN THE LIBEL.

WITH these explanations as to the nature of the libel, and the modifications which may take place on it, we proceed to consider the proof of the particular circumstances which the libel sets forth, in order to characterise the individual act charged.

1. *Manner.*—And first, the manner of the crime, as charged in the libel, must be proved.[1] If the charge set forth that the person murdered was killed by shooting, and if it appear that he was killed by poison, no conviction can follow.[2] In the case of Gowans, (Glasgow, January, 1831,) the pannel was charged with culpable homicide, committed by the *furious driving* of a coach along the public road. Under this charge, the Court held that it was not sufficient to prove that the crime had been committed in consequence of the pannel having *taken the wrong side of the road*, in passing other carriages. The pannel was acquitted.[3] Where the manner of committing the act is charged alternatively, as in a case of murder, said to have been committed with a bludgeon, or some other weapon to the prosecutor unknown, the benefit of that alternative is, of course, allowed to the prosecutor in his proof. In the case of Vallance, (1825,) for theft by housebreaking, the libel charged the pannel with unlocking the door of a shop, "by means of the key thereof, *which you had previously stolen*, or otherwise to the prosecutor unknown." The proof established that the key was *left in the door*, on the outside, after it had been locked; but the Court held that this was sufficient for conviction, under the alternative, "otherwise to the prosecutor unknown." The pannel was convicted.[4]

Where a material discrepancy exists between the charge and the proof in regard to the *person* injured, there can be no conviction. In the trial of John Hannay, (1806,) for the murder of Marion Robson, described in the libel as daughter of John Robson, "late *wright* in West-croft of Lochrutton," it appeared in evidence, that John Robson was not a wright,

[1] By the *manner of the crime* is to be understood the inherent and substantial qualities of *the act itself*. In so far as regards the mode of the pannel's accession to the act, some variation is allowed to the prosecutor, under the charge of art and part.—See below, p. 201.

[2] 2 Hume, 207. [3] Unreported. [4] Alison, 235.

but a *tailor*, and that he had never worked as a wright. The prosecutor thereupon consented to a verdict of not guilty.[1] In the case of M'Pherson, (1824,) the person murdered was described in the libel as "Alexander Davidson, sawyer at Dartulich, *in the parish of Edinkellie, and shire of Elgin.*" It appeared in evidence that Davidson had been a sawyer at Dartulich, *in the parish of Ardclach, and shire of Nairn.* The prisoner was, consequently, acquitted.[2] In the case of Murray, (1826,) tried for rape, the person injured was set forth in the libel as C. Urquhart, "daughter of, and *then*, and now, or lately, residing with Alexander Urquhart," &c. It appeared, that, *at the time libelled*, she had not been residing with Alexander Urquhart, but in a neighbouring parish. The prisoner was acquitted.[3] In the case of John Ferguson, (16th May, 1831,) tried for the murder of an infant child, described in the libel as the illegitimate child of *Marion* Hepburn, it appeared in evidence, that the mother's name was not *Marion* Hepburn, but *Elspeth Manie* Hepburn—Manie being her maternal grandfather's surname, and borne by her on that account. The prisoner was, accordingly, acquitted.[4] In the case of Grant and others, (1817,) the prisoners were charged with assaulting a person of the name of *Tochie*; but, before going to proof, the prosecutor discovered that the man's name was not Tochie, but *Tocher*; he thereupon moved for a desertion of the diet.[5] Similar judgments have been given in cases not inferring personal injury. Thus, in the case of Gillies, (1828,) charged with having raised from the grave the body of "*Robina* Macneil, daughter of Archibald Macneil, cotton-spinner,"—it having appeared on the proof, that the girl's name was not Robina, but *Arohibia*, a contraction for *Archibina*, and that she had been christened by that name, the Court directed an acquittal.[6] In the case of Robert Gillies, (23d May, 1831,) the prisoner was charged with having uttered a forged deposit-receipt, by presenting it for payment, or "causing and procuring the same to be presented *by some person to the prosecutor unknown.*" In the course of the trial, the person who uttered the receipt was adduced, and examined on the subject, as a witness for the crown. In these circumstances, it was pleaded to the jury, on the part of the pannel, that as the

[1] 2 Hume, 197. [2] Ibid.

[3] Ibid.—Baron Hume remarks, in regard to this case, that the designation was wrong in a transient and temporary circumstance only, which it was not essential to set forth, and that the case was, therefore, not so strong as that of Hannay.

[4] Unreported. [5] 2 Hume, 197. [6] Alison, 464.

prosecutor had libelled the uttering as done through an *unknown person*, he was not entitled to substantiate his charge, by proving that it had been done through a *known person*. The Lord Justice-Clerk Boyle, upon this ground, directed an acquittal, and the jury found the uttering not proven.[1]—In a case of theft, if the libel charge the goods to have been stolen while in the possession of A, and it appear that they were stolen while in the possession of B; this variation is fatal to the charge. If the libel specify the owner of the stolen goods, and if it appear that they were the property of a different person; this, it is probable, will also secure the prisoner's acquittal.[2] In the case of Fraser and Mossman, (1810,) the stolen goods were libelled as the property of *John Anderson*, but appeared, in evidence, as the property of John Anderson *and Company*. On a verdict of guilty being returned to that effect, time was allowed to the pannel to state objections in arrest of judgment; but, owing probably to an arrangement between the parties, the point was not argued.[3]—Any material difference between the goods, as described in the libel, and as appearing in evidence, will be fatal to the charge; as, for instance, if it appear in evidence that a *gold* watch was stolen, while the libel charges the theft of a *silver* watch. In the case of Wright, (1808,) the libel charged theft from a carrier's cart, of a parcel, "*addressed to James Budge*, merchant in Anstruther." In the course of the proof, it appeared that the parcel stolen had been addressed (by mistake) to *John Badge*, merchant in Anstruther; and, therefore, did not correspond with the parcel described in the libel. The prosecutor, in consequence, gave up the case, and the jury, of course, acquitted.[4] In like manner, if the libel charge the theft of a certain quantity of wearing apparel, and it appear in evidence that the articles stolen were bed and table linen, the prisoner will be entitled to acquittal.[5] In some cases, the libel charges the theft of certain articles, "and other the like goods." This has the effect, in favour of the prosecutor, of guarding against any trifling inaccuracy in the preceding more special description of the goods; as, for instance, in a charge of stealing a quantity of *drugget* or *serge*, the goods stolen might not properly fall under either of these appellations, and yet be so near them in quality and texture, as to be distinguishable only by persons skilled in such matters.[6] It is not, therefore, to be understood, that under the words, "other the like goods,"

[1] Unreported. [2] 2 Hume, 201. [3] Ibid.
[4] Ibid. [5] Id. 205. [6] Ibid.

the prosecutor is entitled to introduce into his proof any thing but what has a close affinity with the articles specially described.[1]

It has been already remarked, that, under the charge of art and part, the prosecutor is secured against all variations of his proof from the libel which do not affect the substance of the fact itself, but only the mode of the pannel's accession to it.[2] Thus, if the pannel is charged with having committed the crime alone, and without assistance; and if it appear in evidence, either that he had the assistance of others, or that the crime was committed by others with his assistance, this variation will be sufficiently supported by the charge of art and part. If the pannel is charged with having committed murder by shooting the deceased with a pistol, and if it appear in evidence that he had an associate in the business, who did the deed, while he watched at a convenient distance, to prevent interruption, this will be sufficient to convict the pannel; because here there is no variation in the fundamental fact, the murder of a certain person by shooting; the variation is in the mode of the pannel's accession, and that is provided for by the charge of art and part.[3] In like manner, if the libel charge John and James with murder, and relate the fact as having been done by John, who stabbed the deceased with a sword, while James assisted and held his hands; though it come out on the trial that the fact was otherwise, inasmuch as it was James who stabbed the deceased with a sword, while John held his hands, still the indictment is good to convict both John and James, for still the substance of the accusation—the murder by stabbing with a sword—is true, and both pannels are guilty thereof art and part.[4]

2. *Place.*—But, besides proving the manner of the crime, the *Place* also (or *Locus Delicti*, as it is called) must be proved, as set forth in the libel. Thus, if the libel charge a murder as committed on A B, on a certain day, in the city of *Edinburgh*, and if it appear that on the day libelled A B was killed by the pannel in the town of *Haddington*, no conviction can follow.[5] In the trial of Skelton, (1812,) for several acts of robbery, one act was set forth as committed *on the*

[1] 2 Hume, 205. [2] See before, p. 193-4. [3] 2 Hume, 228, 236. [4] Id. 236.
[5] Id. 207.—In like manner, if the crime is charged to have been committed at the house of M, the property of A B, in the county of *East* Lothian, (by mistake for Mid Lothian,) and if it is proved to have been committed at the house of M, the property of A B, in the county of *Mid* Lothian, the jury must acquit, because two places, though of the same name, which are proved on the record of Court to be situated in different counties, cannot be held to be the same place.—2 Hume, 208.

High Street of Edinburgh, *near the head* of the Fleshmarket Close. The person robbed swore, however, that he was assaulted *within the head or mouth* of that close, and *in the first common stair there.* The Lord Advocate, in consequence, gave up the case.[1] In the case of Barbara Wilson, (1827,) charged with the murder of her child, by administering some poisonous stuff to it *in a close* in Saltmarket Street of Glasgow, it appeared that the stuff was given to the child *on the pavement of the broad street* called Saltmarket Street itself. The advocate-depute, in consequence, gave up the case, and the jury found not proven.[2] In the case of Daniel and Caroline Logue, (Glasgow, January, 1831,) the pannels were charged with having stolen a pocket-book from the person of Alexander Crichton, "*in Bridgegate Street* of Glasgow, and at or near that part of said street which is situated near Goosedubs Street." Crichton, however, swore, that when his pocket-book was taken from him, he was standing *in the mouth of Goosedubs Street.* The jury, under the direction of Lord Moncreiff, found the libel not proven.[3] In a case of murder tried at Glasgow, (1818,) the crime was charged to have been committed "*in Jamaica Street* of Glasgow;" but it appeared in evidence that it was committed *in Argyle Street*, and opposite to the mouth of Jamaica Street, which opens into Argyle Street. The pannel was acquitted.[4] In the case of Dewar, (1828,) the prisoner was charged with resetting a quantity of iron within the premises occupied by him as a foundry "situated *at Silverfield*, Yardheads, Leith." It was proved, on the part of the prisoner, that the foundry was *not situated on the ground of Silverfield*, but on the other side of a small stream, and at the distance of several hundred feet from it. The Lord Justice-Clerk Boyle laid it down to the jury, that as the foundry was not described in the libel as being *in*, or *on*, but *at* Silverfield, it was enough for the prosecutor to shew that it was in the immediate vicinity of Silverfield. The jury, by a majority, found the pannel not guilty.[5] In the case of Corbet, (1828,) the pannel was charged with wilfully shooting at, and wounding a boy in the wood called *Straiton Dean*, on the estate of Vogrie. The prisoner brought evidence to shew that the wood in which the boy was wounded is called *Struckon Dean*, and not Straiton Dean. The Lord Justice-Clerk Boyle stated to the jury, that no objection of this kind, arising out of a mere difference

1 2 Hume, 210. 2 Ibid. 3 Unreported.
4 Referred to in case of Corbet, 1828.—Syme, 343.
5 Syme, 295.

of pronunciation, could be sustained. If it had been proved that there was a Straiton Dean on some other part of the estate of Vogrie, it would then have been a case analogous to that of a crime charged to have been committed in one street, and proved to have been committed in another street of the same town. The jury returned a verdict of guilty.[1]

It sometimes happens in cases of theft, when a part only of the exposed property is taken away, that the place of the crime becomes doubtful, in consequence of the remaining property having changed its situation, before the theft is detected. Thus, for instance, if a charge is made for stealing certain sheep from a flock on the farm of A; and if it appear in evidence that, before the sheep were missed, the flock was driven off by the owner of it to the farm of B, and kept there for some days, a doubt would arise as to whether the farm of A was the place of the theft; and that doubt would be stronger or weaker according as it was more or less probable that the crime was committed on the farm of B. In the case of Isobel Macmillan, (Glasgow, January, 1831,) the pannel was charged with having stolen certain articles of wearing apparel *from a green* adjoining to a house in Johnston. It appeared in evidence, that a quantity of clothes had been laid out upon the green, on the day libelled, by a servant-girl, and that, after remaining there for some time, they were carried back to the house by the same person, and thrown aside in the kitchen. After an interval of two or three hours, the clothes were examined, and the articles charged as stolen were discovered to be amissing. In these circumstances, Lord Moncreiff stated to the jury, that he did not consider the evidence as proving satisfactorily that the theft had been committed in the place charged in the libel. The jury returned a verdict of not proven.[2]—The place of the crime is in some cases rendered doubtful by an uncertainty as to the commencement of the pannel's felonious purpose. Ann Macgill (1826) was charged with having stolen a bundle, containing certain valuable articles, *within* a house in Albany Street, Edinburgh. It appeared that a person, who had brought the bundle from Glasgow, sent it to be delivered in Albany Street by a girl, and the pannel was sent along with the girl. *Before entering the house,* the pannel took the bundle from the girl, as if to deliver it, and the girl went away; but the pannel kept possession of the bundle, and carried it off with her, after having remained a short time in the house.

[1] Syme, 339. [2] Unreported.

In this situation, it was pleaded for the pannel, that if there had been a theft, it had been committed *before entering the house*, and not *within the house*, as charged in the libel. The Court considered the case as attended with difficulty; but the jury found the prisoner guilty.[1]

In cases where the prosecutor is allowed a certain degree of latitude in charging the place of the crime, if the pannel offer a proof of *alibi* applicable to the charge, the prosecutor must bring evidence of the precise place where the act was committed. Thus, if the crime is charged alternatively as done in the shire of Perth or Dumbarton, and if the pannel offer to prove that he was, throughout the period libelled, at a certain place in the shire of Perth, and never in Dumbartonshire; the prosecutor must then bring evidence to shew at what particular place the crime was committed; otherwise the jury cannot judge whether the proof of *alibi* does or does not meet the depositions on the other side. If the prosecutor's proof establish that the act was done in the county of Perth, then the pannel has done himself no service by his proof of *alibi*, but rather strengthened the prosecutor's case: if, on the other hand, it shews that the deed took place in the county of Dumbarton, then the two proofs are at variance, and the jury must determine between them, which is the stronger or more credible of the two.[2] It follows, therefore, that a broad or alternative charge of place has not the effect of excluding a proof of *alibi*, in any case to which such a proof is naturally applicable. Of course, in regard to those acts, the place of committing which is immaterial, a proof of *alibi* will be of no avail, as, for instance, the act of fabricating the plates, or of throwing off the spurious notes, in a case of forgery.[3]

3. *Time.*—The *time*, also, of committing the crime must be proved, as set forth in the libel. Thus, for instance, if the crime is charged to have been committed in the month of *June*, (with the usual alternative of the preceding or following month,) and if it appear in evidence that it was committed in the month of *December*, this difference will be fatal to the charge. In the case of Lundie, (Ayr, 1824,) for rape and incest, the crimes were proved to have been committed *in a different year* from that charged in the libel; the prisoner was accordingly acquitted.[4] In the case of Mackenzie, (9th July, 1832,) for theft, the libel charged the crime to have been committed at a certain time in the year 1832, but from the

1 Syme, 18. 2 2 Hume, 221. 3 Ibid. 4 Unreported.

evidence it appeared that it had been committed in the corresponding month of the year 1831. The prosecutor thereupon gave up the case.[1] In the case of M'Millan, (16th March, 1825,) for theft by housebreaking, the crime was charged, with the usual latitude in point of time, to have been committed on the 18th December, 1824, by breaking into a cutler's shop, and stealing therefrom £2. 11s. 6d. together with a sword or dagger, and some other articles. It appeared in evidence that the dagger, which was the only part of the stolen property found in possession of the prisoner, had not been taken away on the occasion libelled, but sometime previously, the owner could not say when; and the prisoner in his declaration stated, that he had broken into the shop sometime during the previous summer, and had taken away the dagger and two shillings in silver, but that he had no concern with the housebreaking and theft libelled. In these circumstances, the prosecutor gave up the case, and the jury found not guilty.[2] In the case of Ann Young, (1826,) the pannel was charged with theft, which was stated to have been committed "*late on the evening* of Thursday the 15th day of December, 1825, or on one or other of the days of that month," &c. in the usual style. It appeared, from the depositions of the two first and principal witnesses, that the goods were stolen *between five and six o'clock in the afternoon* of the day libelled, which the Court thought could not be considered as late in the evening. The prosecutor thereupon gave up the case, and the jury, of course, found a verdict of not proven. The libel in this case would have been quite sufficient without any specification of the time of the day; but as the prosecutor had thus circumscribed his charge, however unnecessarily, he was not entitled to travel out of the limits he had marked for himself.[3]

It has been already stated, that, according to uniform practice, the charge of time is extended to *three months*,—the crime being set forth as committed on one or other of the days of a certain month, or of the month immediately preceding, or of the month immediately following.[4] This latitude of charge, however, occasions no hardship to the pannel; as the time must always be limited in the proof, wherever the nature of the pannel's plea requires it. If the pannel trust to a bare denial of his guilt, and plead no special defence; or if his defence have no relation to the date of the crime, as, for instance, if he admit the homicide, but plead provocation, or

[1] Unreported. [2] Unreported. [3] 2 Hume, 521.—Appen.
[4] See before, p. 193.

admit that he carried off the goods, but say that they are his own; in either of these events, the prosecutor has no farther interest in proving the *time* of the homicide or theft, than to bring it within the period libelled, since nothing depends on fixing it more nearly. But if the pannel prove *alibi* for part of the time, as, for instance, the *first* month libelled, the prosecutor must then bring evidence of the precise date, in order to enable the jury to determine how far the pannel's plea is exclusive of the charge. If the prosecutor fixes the date within the other two months, the proof of *alibi* goes for nothing; if he fixes it within the first month, the jury will then have to consider which proof outweighs. If the prosecutor can only shew that the crime took place within one or other of the three months, the jury must assume, in justice to the pannel, that it happened in the month to which the proof of *alibi* applies; and the question then again arises, Which proof is the stronger, and more credible.[1] Exceptions, of course, exist to this rule in those cases to which the plea of *alibi* is not naturally applicable; as, for instance, the time of *receiving* the goods in reset, or of appending the false subscriptions in forgery.

[1] 2 Hume, 221.

PART IV.

OF THE VERDICT OR JUDGMENT OF THE JURY.

HAVING noticed those matters which seem to be most material, in regard to the nature of the charge brought before the jury, and the manner of proving it, the next subject which claims attention is the *Verdict*, or Judgment of the jury.

Verdicts may be considered either in regard to their form, and the manner of returning them;—or in regard to their substance, or finding.

SECTION I.

FORM OF VERDICTS, AND MODE OF RETURNING THEM.

VERDICTS, in regard to their *form*, are either *viva voce* or *written*.

1. *Viva Voce Verdict.*

According to present practice, all verdicts returned before the adjournment of the Court must be *viva voce*.[1]—A verdict of this kind may be determined on by the jury, without retiring, but, in all cases, they must nominate one of their number as chancellor, to communicate the verdict to the Court. If the jury are not unanimous, this circumstance must be stated by the chancellor, in announcing the verdict, that it may be noted by the clerk of Court in the record.[2]

The manner of returning a verdict *viva voce* is as follows;—The jury, who must all be present, are asked by the presiding judge, or the clerk, whether they are agreed on their verdict, and who is their chancellor, or who speaks for them. The chancellor reports the verdict aloud to the Court, and if it is not a general verdict, but in any respect a special or detailed verdict, it is taken down by the clerk, in the chancellor's words, on a separate slip of paper. From thence the clerk

[1] 9th Geo. IV. c. 29, sect. 15. [2] 6th Geo. IV. c. 22, sect. 20.

transfers it to the record, and it is then read aloud to the jury, and the question is put to them,—*Is this your verdict?* When a verdict has thus been duly transferred from the mouth of the chancellor into the record, and has received the deliberate assent of the assize, as their final answer on the matter remitted to them, it acquires the nature of a written verdict, and cannot then be explained or modified, in any respect, by the declarations of the jury. In the case of Grant, (1818,) tried for assault, aggravated as being done to the danger of life, a *viva voce* verdict was returned by the jury, and entered in the record as follows:—"The jury find the pannel guilty, *but not to the extent libelled.*" A doubt having been expressed as to the import of this verdict, the chancellor, on a question from the bench, stated, that they meant to find the pannel guilty of the assault, but not to the danger of life; and sentence accordingly passed. Baron Hume seems to think, however, that no explanation from the jury was competent in a case of this kind, and that the verdict ought to have been taken as it stood in the record, however obscure and defective.[1] It does not, however, follow from this, that explanations may not be competently received from the jury, *before* the verdict has passed into the record. Thus, the chancellor, in his first essay to announce the verdict, may sometimes make use of terms which are not technical or apt for the case, or are equivocal or ambiguous, or do not sufficiently acquaint the Court what the assize truly mean to find;—a situation which naturally leads to some kind of intercourse between him and the Court, as to the technical correctness of his language, and the meaning which it is intended to convey.[2] Thus, in a case to be afterwards noticed, where the jury returned a general verdict of guilty, on an *alternative charge*, they were required by Lord Gillies to state to which of the charges they meant their finding to apply. It is of great importance, however, that the jury should express their meaning distinctly *at first*, and in terms sufficiently applicable to the case before them;—and this, by taking a little pains, they may always be able to do. They will thus avoid the risk of error arising from the hurried and public explanations of their chancellor; and they will also relieve the Court from the painful necessity of interfering with them in matters of so much delicacy and importance.

[1] 2 Hume, 426. [2] Id. 431.

2. *Written Verdict.*

As already mentioned, *written verdicts* are now only competent in the case where the Court adjourns before the verdict is returned.[1] In regard to the *style*, or formal part, of a written verdict,—the names and surnames of the persons of assize (the *sederunt*, as it is called) must be set down, which serves the purpose of vouching that they were fully met; but the votes do not require to be marked.[2] If a name is omitted, or a wrong one introduced, in the sederunt, the error may be afterwards corrected, if the jury unanimously testify to the Court that the proper persons, and no other, were present on the occasion. The verdict then proceeds:—"The above assize having enclosed, made choice of the said A B to be their chancellor, and the said C D to be their clerk, and having considered the criminal libel, raised and pursued at the instance of his Majesty's Advocate, for his Majesty's interest, (*or as the case happens to be,*) against M N, pannel, interlocutor of relevancy pronounced thereon by the Court, the evidence adduced in proof of the libel, and evidence in exculpation, (*where such there is,*) they find," &c. It is very doubtful how far this fulness of detail is essential, for it may fairly be presumed, in favour of the assize, that they take into consideration all the proceedings before they decide. This form, however, has been for a long period in use.[3] In the case of Malloch, (1750,) an objection was disregarded, that the preamble of the verdict took no notice of the proof of the libel.[4] And the same thing happened in the case of Campbell, (1823,) where the verdict bore, that the jury had considered the *indictment* against the pannel, instead of the *criminal letters*.[5] An error in the verdict, in regard to the pannel's name, may be rectified, on the testimony of the assize, at entering the verdict on record; for this is a fact, the true state of which is as palpable before, as after the amendment is made. In the case of Robert Hall, (1791,) the surname of the pannel was omitted in the verdict, but the jury having unanimously testified that the pannel was the person intended in their verdict, and that the omission had arisen from mistake, the verdict was held good.[6] After the *preamble*, the *judgment* or *finding* of the jury is inserted; of which an explanation will be given in the next section. Then follows the *conclusion*, which is usually in these words:—

1 9th Geo. IV. c. 29, sect. 15. 2 2 Hume, 433. 3 Id. 436.
4 Ibid. 5 Id. 433. 6 Id. 439.

"In witness whereof, their said chancellor and clerk have signed these presents in their presence, and by their appointment:"—to which the chancellor and clerk subjoin their subscriptions. The verdict is good, without the attesting subscriptions of witnesses; and it is not necessary, though it is usual and proper, for the chancellor and clerk to subscribe each page, where the writing consists of more than one.[1] It is material that the date affixed to the verdict be correct. In the case of Rankine, (1821,) the verdict was dated 11th September, whereas, the jury were not enclosed till *after twelve* o'clock at night of the 11th, that is, on the 12th September. An objection, however, taken to the verdict on this ground was repelled.[2]—In the case of Douglas and Adie, (1822,) it was objected to the verdict, that it was partly written, and partly printed. The Court sustained the verdict by a narrow majority, and the pannels afterwards received a pardon.[3] —The verdict, after being subscribed, is folded, and sealed up, in presence of the jurors, while still enclosed.

The form of returning a written verdict is as follows:— The names of the assize being called over, in presence of the Court, they are asked who is their chancellor; and from his hands the verdict is received by the presiding judge, who having unsealed and perused it, delivers it to the clerk of Court, to be by him transferred into the record; after which, and a careful comparison of the record with the original writing, which takes place under the eye of the Court, and the counsel for both parties, it is announced, and read aloud. It is necessary that the whole persons of assize be present on this occasion, that they may hear and acknowledge the verdict, as transferred to the record, to be theirs; and there is no doubt, that, if such a thing should happen as the substitution of a spurious verdict, by their chancellor and clerk, for the real one agreed to by the jury, they would be entitled to challenge it, and have it thrown aside on that ground.[4] It would seem, however, that a part of the jury would not be entitled to challenge the verdict as having been irregularly obtained by certain of their number, by means of threats or importunities; for it is both their duty, and within their power, to resist any such attempt to constrain or mislead them.[5]—The decision of the jury, as communicated through the medium of a written verdict, cannot be, in any respect, explained or amended by the assize in Court, on the ques-

[1] 2 Hume, 430.
[2] Shaw, 63.
[3] 2 Hume, 433.—See also Shaw's Cases, No. 121.
[4] 2 Hume, 429.
[5] Id. 430.

tion or suggestion of the judge, nor can the judge re-enclose them to reconsider and correct their verdict for themselves. It must be taken from them as it is, with all its imperfections, however great, and without regard to the prejudicial consequences which may sometimes attend such an issue of the trial.[1]

SECTION II.

SUBSTANCE OF VERDICTS.

VERDICTS, in regard to their substance, are either *General* or *Special*.

1. *General Verdict.*

A general verdict is a report complexly of the result of the jury's opinion on the case; as, that the pannel is *guilty*, or *not guilty*,—or that the libel is *proven*, or *not proven*,—without any disclosure of the grounds on which the jury have come to such a conclusion.[2] The phrase *not proven* is usually employed to mark a deficiency only of the full measure of evidence to convict the pannel; and that of *not guilty* to convey the jury's opinion of his innocence of the charge. In all cases, a general verdict is final as to the prisoner's guilt, and the Court cannot, upon any ground, decline to carry it into effect. "So that, though the jury find *guilty* without any evidence, or *not guilty* against all evidence; nay, though they find a verdict against their own knowledge both of the fact and the law; yet still, as their decision, it must and will pass unquestioned with the Court."[3] It is needless to say, that there cannot be any inference from the *power* to the *right*, on the part of the jury, of acting in this wrong and unjustifiable manner.

A verdict of *guilty art and part*—which is a form sometimes employed—is substantially the same as a simple verdict of guilty. This results from the nature of the accusation of art and part, which is a mode of charging an immediate concern in the crime, and is employed even where, upon the shewing of the libel itself, the act appears to have been done by the pannel alone.[4] Juries ought to be aware that such is the construction of law, as it is believed that, in using

[1] 2 Hume, 430. [2] Id. 429. [3] Id. 449. [4] See before, p. 193.

the phrase *art and part*, they have sometimes supposed that they were convicting of an inferior degree of guilt to that charged in the libel. In the case of Stuart, (1813,) the verdict found the pannel "actor, guilty art and part." The usual order of the words was thus transposed; but the verdict was sustained, and sentence passed as on a simple verdict of guilty.[1] In the case of Peacock, (1743,) the jury deviated from the ordinary phrase, and returned the pannel "*accessary* art and part to the murder of his wife,"—a style which might be alleged to signify rather some subordinate and relative sort of guilt. But the Court held, that here also the words *art and part* must receive their ordinary construction, and the prisoner had sentence of death.[2]

A general verdict of guilty amounts in law to a conviction of all the charges in the libel, so far as they are laid *conjunctively*; but such a verdict is bad, where the charges are laid *alternatively*. In the case of David Watt, (15th November, 1824,) the pannel was charged alternatively with robbery and theft; and the jury returned a general verdict of guilty. The Court held, that no sentence could pass upon this verdict, in as much as it did not ascertain of which of the crimes charged the prisoner was guilty, and he was not charged as being guilty of both.[3] In the case of Sinclair, Maclachlan, and Baird, (Glasgow, September, 1825,) the pannels were tried on an alternative charge of theft and reset, and the jury returned a general verdict of guilty. On an objection being taken to the verdict, the Advocate-depute stated, that, in addressing the jury, he had specially asked a verdict of reset against Baird, and of theft against the other two; and he

[1] 2 Hume, 441. [2] Id. 442.

[3] The following opinions were delivered in this case:—Lord Hermand:—The verdict ought to be considered as a conviction of the lesser crime; and the pains of law awarded accordingly. In a case of this kind which occurred about fifty years ago,—where there was an alternative charge of robbery and reset,—Sir Thomas Miller inflicted the *levior pœna*.—Lord Gillies:—Theft and robbery are distinct crimes, and not consistent with each other; this, though it were not expressly fixed, is evident from the fact, that what is an aggravation of theft, is not an aggravation of robbery; the prisoner, therefore, cannot be held guilty of both. But though these crimes were consistent with each other, the libel only charges one of them; and, therefore, the prisoner cannot be held guilty of both. If any punishment is to be inflicted, it must be the *levior pœna*; a similar rule exists in civil matters,—*Levior obligatio presumitur*. But I do not think that any punishment can be inflicted, for there is here no certainty of guilt. Suppose the pannel convicted on an alternative charge of two statutory offences, with different punishments annexed to them; by what rule could the Court pronounce sentence in such a case?—The Lords Justice-Clerk Boyle, Pitmilly, and Meadowbank, concurred in this opinion.—Baron Hume, in noticing this case in the late edition of his Commentaries, has been led into an error in regard to the point embraced in it.—See Vol. II. p. 402.

submitted that the verdict must be considered in reference to what the prosecutor asked. As the jury, however, had left the matter undetermined upon the verdict itself, Lord Gillies held, that no punishment could be inflicted.[1] A similar case occurred during the same circuit, where the jury, *not having left the box*, were required by Lord Gillies to explain their verdict; and having done so, sentence passed.[2] In these cases the crimes charged were inconsistent with each other, and this is usually the case where the charge is alternative. The rule, however, is general, and applies whether the crimes are inconsistent or not, provided they are alternatively charged.[3]

2. *Special Verdict.*

A special verdict is a return of certain facts or circumstances as proved, without the addition of any general inference from them as to the pannel's guilt,—an inference which is left to be made by the judge, according to his opinion of the lawful construction of the facts thus laid before him.[4] In framing such a verdict, the jury must be careful to express themselves distinctly; for it sometimes happens that, in using many words, they rather darken than elucidate their meaning; and when they enter into a detail of particulars, there is always a risk that they may miss that certainty and precision which is attached to the brief and established phrases of style.[5]

1. The verdict must make an explicit return of certain facts, *as proved*. If the verdict say with respect to one fact, that it is admitted in the pannel's declaration, that another is sworn to by a single witness, and another still by several witnesses, and makes no conclusion of *proved* or *not proved*, this is at least a questionable verdict, for it devolves the office of the jury upon the judge, who cannot lawfully accept it. In such a verdict there are no facts for the Court to consider or construe. The reference to them is to determine as to each particular circumstance whether it is proved or not; and this is the duty of the jury themselves.[6]

2. The facts must be returned *absolutely*, and not in a provisional or alternative form. Thus, in a case of perjury, a verdict is bad which finds the pannel guilty of swearing to certain matters which he *ought to have known* were not true.

[1] 2 Hume, 442. [2] Unreported.
[3] Opinion of Lord Gillies in case of Watt.—See note on preceding page.
[4] 2 Hume, 439. [5] Id. 443. [6] Id. 445-6.

In a trial for sheep-stealing, the verdict is bad, if it find that the sheep in question were stolen, *or* strayed; however full it may be in finding the pannel's possession of the sheep, and other presumptions of dishonesty.[1] In the case of Carruthers and others, (1731,) charged with deforcement and *robbery*, as having carried off certain fire-arms belonging to a party of revenue-officers, the jury found that the arms "were *lost or taken away* by the foresaid mob." This verdict was held to absolve the pannels of the charge of robbery, and sentence passed as for deforcement only.[2] In like manner, where several persons are charged with the same fact, the verdict is faulty if it find that the thing was done by one or other of them, without determining which. Thus, in the case of Buchanan and Lilburn, (1771,) for murder, the jury found, in substance, that the pannels, "both, *or either*, of them," gave the strokes of which the deceased died. The pannels were absolved.[3]

3. The verdict must find such circumstances proved, as constitute the *specific crime* charged; for if any essential element of the guilty act is omitted, or found not proved, the pannel must be absolved. In the case of Munro, (1799,) the pannel, who was a runner of the post-office, was charged with *stealing*, and *feloniously abstracting*, certain letters from the bag under his charge. The jury found him "guilty of *abstracting*, at the time libelled, the four letters," &c.; but they omitted to say that he abstracted them *feloniously*, or *as libelled*. The prisoner was therefore absolved. The omission of the jury left it doubtful whether he had been actuated by that felonious intention which is essential to all crimes.[4] In the case of Mackechnie and Wright, (Glasgow, 1827,) the pannels were indicted for uttering forged bank-notes, knowing the same to be forged. The jury found "the uttering the forged notes proven; but *the guilty knowledge libelled not proven*." It was held by Lord Mackenzie, that no punishment could follow on this verdict.[5] In the case of Heath and Crowder, (Glasgow, September, 1831,) tried for theft, by housebreaking, the jury found Heath guilty; and, in regard to Crowder, they found "that she was in the previous knowledge of the theft, but *had no participation therein*." She was assoilzied.[6] In the case of Boyd and others, (1797,) the prisoners were charged with riotously assembling, and violently and tumultuously breaking into

1 2 Hume, 444.
2 Id. 445.
3 Maclaurin, No. 86.
4 2 Hume, 449.
5 Id. 447.
6 Unreported.

the house of a magistrate, with intent to obstruct the Militia Act. The jury found that the pannels "did enter into, and continue in Mr. Lockhart of Cleghorn's house, for some time, contrary to his orders, and against his consent." This finding did not amount to a violent and tumultuous entry; and the prisoners were accordingly absolved.[1] In the case of Johnie, (1775,) tried on a charge of theft and *reset*, the prisoner was, by the verdict, found "guilty of buying goods from William Balfour, *suspecting* them to be stolen." As the quality of guilty *knowledge*, essential to reset, was here wanting, the prisoner was assoilzied.[2] In the case of Watson and Gray, (1799,) tried on a similar charge, the jury convicted Gray of purchasing certain quantities of tallow, "which tallow, *he had reason to believe*, had been in some way illegally carried off." Sentence followed upon this verdict; but both Baron Hume and Mr. Burnett think that the conviction was bad.[3] In the case of Stewart and Irvine, (1800,) tried for theft, aggravated by housebreaking, the jury "find it proven, that the house of Deans was broken into on the night between the 3d and 4th days of March last, and sundry articles of bed and table linen stolen therefrom: But find it not proven that either of the pannels were guilty, art and part, of the housebreaking aforesaid: And they all, in one voice, find it proven, that both the pannels, Charles Stewart and James Irvine, are guilty, art and part, of *having in their possession sundry articles that were so stolen from the house of Deans, knowing the same to be stolen.*" This was a sufficient conviction of *reset*; but as the charge in the indictment was *theft* only, the prisoners were assoilzied.[4] In the case of Heughan, (1816,) the pannel was charged, both at common law, and on a certain statute, with forging and uttering Excise debentures. The statute, however, punished the *forging* only, and not the uttering. The verdict convicted of the *uttering* only. The Court, being of opinion that the prosecutor had substantially *restricted his charge to the statutable crime*, found that no sentence could follow on this conviction.[5] In the case of Wallace and others, (1821,) tried on a charge of assault and *robbery*, the jury found "the pannels guilty of *the theft libelled*, art and part." The Court held that no sentence could follow upon this verdict.[6] It had appeared on the evidence—at least the jury thought so—that the articles charged as taken *by robbery* had been snatched away by surprise, with-

[1] 2 Hume, 448. [2] Burnett, 156. [3] 2 Hume, 441,—Burnett, 156.
[4] 2 Hume, 449. [5] Ibid. [6] Shaw, 90.

out demand, struggle, or putting in fear, and that, consequently, the crime was *theft*, and not robbery.[1] In the case of Peddie, (1791,) charged with assault, *with intent* to ravish, the jury found him guilty of assault, but *not* with intent to ravish. The Court found that no punishment could follow upon this verdict. By the form of the charge, the intent was made an ingredient and portion of the assault; and a conviction of the assault, without the intent, was therefore a conviction of a different crime from that charged. —It is proper to remark here, that when circumstances are charged separately as aggravations of the crime, the jury may find the prisoner guilty of the crime, without the aggravations. Thus, in the above case of Peddie, if the intent had been charged as a separate aggravation, instead of an ingredient and quality of the assault, the verdict would have been good. In cases of theft, charged with the separate aggravations of housebreaking, or habite and repute, the jury may convict of the theft, and find the housebreaking, or habite and repute, not proven; and the same is true with regard to all aggravations charged separately as such; and not as inherent elements of the crime itself. The jury, therefore, ought always to attend carefully to the manner in which aggravating circumstances are charged, and to distinguish between those which are mixed up with the crime, and those which are kept distinct, and charged separately from it. The distinction in form between these two modes of charge has been already explained.[2]—It follows, from what has just been stated, that a verdict is bad which acquits the prisoner of the crime, and finds him guilty of the aggravation; the aggravation being a mere accessory or appendage of the crime. In the case of Henderson, (1802,) on a charge of theft, aggravated by habite and repute, the jury returned this verdict,—"Find it not proven that the said Allan Henderson is guilty of any of the acts of theft libelled; and they all, in one voice, find it proven that he is habite and repute a thief." As this was a conviction only of the aggravating quality, the prisoner was assoilzied.[3] The same thing occurred in the case of Fleming, 1817; and again in the case of Beatson and Macpherson, 1820.[4] In

[1] 2 Hume, 450. [2] See before, p. 189-90. [3] 2 Hume, 450.
[4] 1 Hume, 95.—The acquittal of a prisoner, by a general verdict, on a charge of theft, aggravated by habite and repute, does not prevent him from being tried immediately afterwards for a different act of theft with the same aggravation.—1 Hume, 95.—Where the evidence, therefore, has failed in regard both to the crime and the aggravation, the jury ought to apply the finding of acquittal to the habite and repute, as well as to the theft.

the case of Tarras, (1802,) tried on a libel which charged "*theft*, especially when committed by means of shopbreaking, and by a person who is habite and repute a thief," the jury "find the said William Tarras guilty of the *shopbreaking* libelled on; but unanimously find the charge of being habite and repute a thief not proven." In this verdict, no notice is taken of the *theft*, which is the crime charged in the libel, and is only characterized there by the *shopbreaking* as an aggravation. The prisoner was accordingly absolved.[1] This case is instructive, as shewing the necessity, on the part of the jury, of attending minutely to the nature of the charge, and the import of the terms employed in it. There can be little doubt that the jury here supposed that the term *shopbreaking* included both the theft and the aggravating quality accompanying it.

As an exception to the rule, that the verdict must convict of the special crime libelled, it has long been settled, that under a charge of murder, the jury may find guilty of culpable homicide. Of course, if the prosecutor restrict his charge of murder to a charge of culpable homicide, the jury can only convict of the latter crime; but they are entitled to convict of culpable homicide, though the charge of murder is sent to them unrestricted. In all such cases, the jury may either convict of culpable homicide generally, or they may make a return of facts inferring that crime. It has been already remarked, that juries sometimes convict of culpable homicide, in order to save the prisoner's life, where the case is, in law, a case of murder. When they adopt such a course, however, they certainly act most unwarrantably; and the mistaken feelings of humanity, by which their conduct may be dictated, will in no case relieve them from the charge of gross dereliction of duty.

4. The verdict must not only convict the pannel of the species of crime charged, but of *the particular fact*, as related, in the libel.[2] It is to be observed, however, that the conviction is good, if the verdict is applied to the fact sufficiently in substance, and to ordinary apprehension, though not expressed in the most correct technical form. In the case of Leprevick, (1784,) for sheep-stealing, the prisoner was found "guilty art and part of the crime of sheep-stealing, and *selling* fifteen or more of the *sheep libelled*." This verdict was objected to, on the ground that it did not state that he had *stolen* the sheep libelled. The Court, however, held that, though somewhat inaccurate, it was substantially a

[1] 2 Hume, 449. [2] Id. 432.

conviction of stealing and selling the sheep libelled.[1] In the case of Lillie and others, (1797,) tried for a riot in hindrance of the execution of *the Militia Act*, the verdict found him "guilty of mobbing and rioting, with the intent and purpose of violently resisting and opposing the execution of *a public law*." An objection was stated, that the verdict ought to have referred expressly to the particular statute libelled; but this objection was repelled.[2] Haggart and Forrest (1821) were indicted for theft, aggravated by housebreaking; housebreaking, with intent to steal; reset of theft; and breaking prison. The verdict was, "guilty of theft, but not of reset of theft; but by a majority of voices, find the charge of housebreaking not proven." This verdict was objected to as inapplicable to the indictment; but, on advising informations, the Court repelled the objection.[3] In the case of Ochterlony, (1716,) for forging certain stamps, the jury "find it proven that the pannel did make use of a screw-press, and counterfeit stamps, impressing, counterfeiting, and resembling his Majesty's stamps, upon paper." In this verdict, the jury did not say that these stamps were the stamps *libelled*, or that the pannel counterfeited stamps *as* libelled; yet their meaning was plain; and sentence accordingly passed.[4] In like manner, the verdict in the case of Mary M'Kinnon, (1823,) for murder, was received without objection; it was in these terms: "Find the pannel guilty of murder:"—without adding the words, *as libelled*.[5]

Where a verdict, in setting forth its finding, makes a tacit reference to the libel for any act or proceeding, it is held virtually to find that act or proceeding proved, with all its qualities, as there set forth. Thus, in the case of Fraser, (1784,) the jury "find it proved that the pannel, John Fraser, was present and active in *the mob and riotous assembly mentioned*, and that he grossly insulted the Sheriff, Mr. Cockburn, in the execution of his duty." Sentence passed upon this verdict, as if it had found proven all the outrages ascribed to the mob in the libel.[6] In the case of Robertson and Berry, (1793,) for printing and publishing a wicked and seditious pamphlet, the verdict was as follows: "Find it proven that the said James Robertson did print and publish, and that the said Walter Berry did publish only, the pamphlet libelled on." It was held that this verdict substantially characterized and described the pamphlet under all the

1 2 Hume, 454. 2 Ibid. 3 Shaw, 16.
4 2 Hume, 455. 5 Ibid. 6 Id. 456.

epithets applied to it in the libel, and that the guilt of the prisoners fell to be judged of accordingly.[1] In the case of Bell and Mortimer, (1800,) one of the charges against Bell was the *uttering* of a certain bank-note, *by delivering it to Young, an associate, that he might pass it as genuine*; which Young accordingly did. The verdict found Bell "guilty of fraudulently and feloniously using, *uttering*, and vending, the forged and counterfeited note libelled on." It was held, that this verdict sufficiently applied to the charge in the libel; and that it was not necessary for the jury to specify or repeat the circumstances of the uttering.[2]

Where there are several charges set forth in the libel, the jury must be careful to describe correctly the particular charge, or charges, of which they mean to convict. Napier and Grotto (1812) were indicted for a murder, being the first article of charge in the libel, and ten several acts of robbery. At calling the diet, the prosecutor departed from the charge of murder, and restricted the libel to two acts of robbery, being the 9th and 11th articles of charge. The jury found Napier guilty of the robbery of John Buchan Brodie, "as libelled in the 8th charge *of the indictment*;" and Grotto guilty of the robbery of Peter Bruce, "as libelled in the 10th charge *of the indictment*,"—these charges (which were in truth the *9th and 11th of the indictment*) being so numbered by the jury, on the principle, that, as the charge of murder had been departed from, it was not to be counted. The Court held that the verdict, though inaccurate, fell to be construed as if the jury had said the 8th and 10th charges *of robbery* in the indictment; and sentence accordingly passed.[3] In the case of Elliot, (1800,) charged with forging and uttering bank-notes, *three* of the acts of uttering were stated in the libel to have happened at places in the county of *Northumberland*, the others, to the number of sixteen, at different places in Scotland. On an objection being taken to the relevancy of the libel, in regard to the acts done in England, the Lord Advocate stated, that these were inserted merely in the way of narrative, and in order to give full information to the pannel; but unfortunately, no minute so restricting the charge was entered on the record, nor was any exception or distinction made by the Court in their interlocutor of relevancy. The prosecutor adduced only one witness as to the acts done in England; but as to the acts done in Scotland, a great many witnesses deponed, and, in

[1] 2 Hume, 456. [2] Id. 455. [3] Id. 453.

particular, identified nine of the notes which were produced in evidence. The following verdict was returned by the jury: "They all in one voice find the pannel, George Elliot, guilty of fraudulently and feloniously uttering, vending, and using *certain of the notes libelled on*, knowing the same to be forged." There could be no doubt, on the whole proceedings, that the jury meant to convict of the acts of uttering done in Scotland; but as the verdict *might* relate to the acts committed in England, the Court held that no sentence could pass upon it.[1] Had the jury described explicitly the articles which they found proved, the conviction would have been good, notwithstanding the omission of the prosecutor to restrict; indeed, it was the vague and indefinite nature of the verdict that made that omission fatal.

There is one species of deviation of the verdict from the libel which is freely allowed, and not being truly such, but in appearance only. It has been already explained, that under the charge of art and part, the prosecutor is entitled to establish the pannel's guilt by any train of relevant circumstances, equally as by those related in his libel.[2] It is, therefore, no objection to a special verdict, that it makes a return of circumstances, connecting the pannel with the crime, which are no part of the story told in the indictment. Thus, in the trial of Kirkpatrick, (1760,) for riot, the jury found, among other circumstances, "that while Bailie William Clarke was reading the proclamation against riots as libelled, the said William Kirkpatrick called out to take the book or act from him the said William Clarke." This circumstance had not been stated in the libel; but the Court held that, in passing sentence, they were entitled to take it into account.[3]

It is always important, in special verdicts, that the jury should state all the material circumstances which have been proved, and that with as much minuteness as the matter will admit of. Thus, if the jury find that the pannel struck the deceased, they ought to specify with what weapon, whether severely or not, and, perhaps, how many blows. Where the fact is stated vaguely and generally, the Court are entitled to look into the evidence for the particulars of it; and these particulars, as selected by the Court, may be in some degree different from those which would have been attached to it by the jury. It is advisable, therefore, that the jury should settle this matter themselves, wherever the evidence will allow them, by stating the fact with all its material particu-

[1] 2 Hume, 452. [2] See before, p. 201. [3] 2 Hume, 456.

lars.[1] A special verdict—like a general verdict—is good, though it fail to exhaust all the points of the libel, or even to make an answer with regard to all the pannels; its silence is held to be an acquittal as to all the matters, charges, and persons omitted.[2]

A special verdict ought not to be returned, in any case, where the jury find themselves in a condition, upon the evidence, to return a general verdict. It is the province of the jury to determine the whole matter remitted to them; and where they are satisfied, therefore, that the prisoner is guilty, or not guilty, or that the libel is proved, or not proved, they are bound to say so, without devolving any part of their duty upon the Court. In the case of Reid, (1766,) tried for sheep-stealing, aggravated by habite and repute, the following verdict was returned by the jury:—"All in one voice find the said pannel being habite and repute a common thief, not proven; and, by a plurality of voices, find it *not proven that he stole* and carried off the sixscore of ewes, or thereby, from the farm of Craigkingle-doors, the property of Robert Laidlaw, tenant there, and his herd: But with one voice, find proven, that soon after the sheep were carried off the said farm, the said pannel came to the house of Malcolm Brown, innkeeper at Camlachie, near Glasgow, with sixscore of sheep, or thereby, in his custody, which he offered there to sale, and which sheep thereafter were claimed by the said Robert Laidlaw, who brought a proof that the above-mentioned sheep were his property." In this verdict, the jury, after finding the theft not proven, set forth certain circumstances of suspicion against the pannel; but as these circumstances were not sufficient, in the opinion of the jury, to infer the prisoner's guilt, they ought to have returned a simple verdict of acquittal. The Court construed the verdict accordingly, as a finding of not proven.[3]

[1] 2 Hume, 458.

[2] Id. 462.

[3] Id. 460.—A verdict of a very iniquitous kind, but somewhat similar in construction to that mentioned in the text, was returned in the case of the Master of Burleigh, (1709,) who was tried for the murder of Henry Stenhouse, by shooting him with a pistol; the verdict was as follows:—"They do, by the plurality of voices, find it proven, that the said Robert, Master of Burleigh, was at the school-door of Mr. Henry Stenhouse, schoolmaster at Inverkeithing, with pistols, mounted on horseback, at or about the time libelled; and likewise find it proven, that the said Robert, Master of Burleigh, did discharge a pistol against the said Mr. Henry Stenhouse; as also, finds it proven, that the said Mr. Henry Stenhouse was wounded in two places on his left arm, below the shoulder; and that he died within twelve days after he was wounded: *But find it not proven that the said wounds were given by the shot of the pistol discharged by the said Robert, Master of Burleigh.*" By subjoining such a conclusion to their ver-

It follows from all that has been said, in regard to the nature of verdicts, that the jury are the sole and exclusive judges, both as to matters of fact and law; in other words, that they are entitled, and called upon, to determine, not only whether the evidence has established the facts, but whether the facts, supposing them to be established, amount to the crime charged. Such is undoubtedly the province of the jury; and it is equally certain, that their judgment is good and effectual, even when opposed both to the evidence, and to their knowledge of the law.[1] It is certainly, however, unnecessary to say, that though the jury possess, like all other judges, the *power* of abusing their office, they do not thence acquire any *right* to do so, or any immunity from the reproach and guilt that attach to all corrupt and unconscientious judges. In regard, especially, to a verdict of acquittal found by a jury against what they know to be law for the crime in question; whether, because they think the law more severe than it ought to be, or the time unseasonable for applying it, or that they see special grounds for the extension of mercy to the case; it cannot be regarded in any other light than as a usurpation of the royal prerogative, and an infringement of their oath of office. The assize are as judges sitting on the particular case, and cannot, any more than other judges, enjoy a power to dispense with, or alter, the law of the land, in virtue of which alone they are an assize, and the pannel entitled to the high privilege of trial in that manner. When they assert such a pretension, the assize are not laying claim to be judges *of* the law, but to *judge the law* itself, and the legislature also, and to set their own wisdom and authority above both.[2] It is to be remembered likewise, that wherever the law is thrown aside, the trial is alike arbitrary, whether it be with a jury or a court; and in no respect less liable to abuse in the hands of the one than of the other. The power of dispensing mercy, in opposition to the requirements of legal justice, belongs

dict, this unconscientious assize probably thought that they had taken the Master of Burleigh out of all danger of his life. But the Court were of a different opinion; and, after some delay, proceeded to pass sentence on him as convicted of the murder. Yet still, as the assize had reported, however unreasonably, that there was not evidence that the deceased had been killed by the pannel's fire, this was substantially the same as adding a general conclusion of not proven. It may be questioned, therefore, whether it would not have been better, and more correct, that the pannel had been allowed the full benefit of this unjust and corrupt acquittal.—2 Hume, 460.—The jury, in this singular case, consisted of five baronets, six other landed men, and four merchants of Edinburgh.

[1] 2 Hume, 449. [2] Ibid.

to the Sovereign alone,—a resource being thus provided for redressing those hardships in particular cases which may sometimes arise out of the inflexible, but just, severity of the penal laws. This is a consideration which ought always to be kept in view by the jury; so that, for no reason of favour or compassion, or regard of popular opinion, ought they to swerve from their oath, or that obedience which they owe to the laws of the land.[1] Their obvious course, wherever the case may seem to require it, is to point out, in the form of a recommendation to mercy, those reasons for equitable consideration which they may regard as important; and such recommendation will, in all cases, be duly attended to.

[1] 2 Hume, 495.

INDEX.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

Q.

R.

S.

T.

U.

V.

W.

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